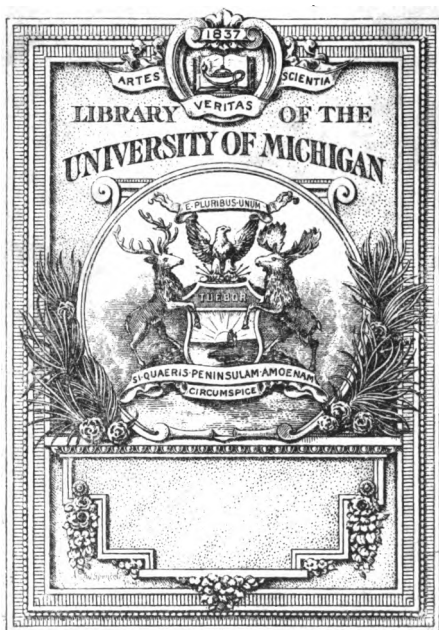

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A FEW LECTURES
ON
NATURAL LAW,

By HENRY ST. GEORGE TUCKER,

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CHARLOTTESVILLE,
Published by James Alexander.

1844.

YOUNG GENTLEMEN OF THE JUNIOR LAW CLASS:

We commence the labours of the session in this school with the study of Natural Law.—It is with unaffected diffidence that I enter upon the investigation of a subject which has employed the pens and occupied the reflections of many eminent philosophers, and the rather as the habits and occupations of a busy life and of a profession which is too apt to be exclusive in its demands upon our time, have withdrawn my own mind from all familiarity with the able treatises with which the school of Ethics has abounded. From these considerations I should have preferred an entire reliance upon a text book, but that there is none which has adopted and carried out a system of Natural Law upon the plan which seems to me most advisable for a *School* of Law. I purpose therefore, besides the use of the ordinary text book, to deliver to the class occasional lectures upon the subject, with a view of explaining the true spirit of the law of nature, and of pointing out its agreement or disagreement with the positive or municipal law.

It is said by Mr. Paley that moral philosophy, morality, ethics and natural law, all mean the same thing: namely, "*The science which teaches men their duty and the reasons of it.*" In this very general sense there would seem to be embraced the subject of ethics, (properly so called) which has been assigned to the fertile genius of another member of the faculty, as well as that of natural law in a more restricted sense, which has been attached to the du-

Readers. 3-20-31 EWN

ties of this school. With this understanding of the matter, it is my purpose to avoid touching upon that portion which will be so much better treated elsewhere, and to confine myself to those views of it, which are more practical than speculative, and which are best calculated to throw light upon the main subject committed to my charge. As we approach our *entrè* upon the great theatre of life, it is important that we lay aside somewhat of the metaphysical subtleties of the schools, and take that common sense view of every matter which is best calculated to give us just opinions of human life and human duties. I shall therefore consider natural law as that *rule of rectitude which is prescribed to us by the author of our being and pointed out by our reason*; and which lies at the foundation of all wise and salutary systems of positive law.

It shall moreover be my object to satisfy you that there *is* such a rule of rectitude growing out of our constitution, founded on our nature, binding every where, and the source from which all human laws derive their validity and value.

In the enforcement of these positions, if in following the example of other writers upon the subject, I shall occasionally speak of man as in that state which is familiarly called a state of nature, I beg it to be understood, that it is from no belief that such a state has ever had existence. The natural state of man has ever been and ever must be a state of society; rude indeed (if you please) and confined to the narrowest limits, but still coeval with created man. Take the holy scriptures for our guide and the fact is proved at once! reject them and give the reins to our imaginations, and whither will our unbridled fancies run? Do they point to an eternity behind us? Our mortal eye will never penetrate the mists that hang around it. The keenest vision reaches not beyond a date, far, far within the period when countless millions mingled into society. It is the bible only that tells us of the time when man was found alone; when

The world was sad; the garden was a wild,
And man the hermit sighed till woman smiled.

The supposition therefore of what is called a state of nature, is at most gratuitous and is demonstrably impossible. Yet in dissecting the human heart and exploring the laws which grow out of our nature and constitution, it serves to simplify our reasonings to proceed upon the favourite hypothesis of the existence of a state of nature in the primitive ages of the world. Thus far I have fallen in with the ordinary mode of treating the subject; but I beg to be understood as discarding altogether a *belief* in that hypothesis.

If there be any truth which on all hands will be acknowledged to be universal, it is, that there is nothing in nature which has not its laws. You will have derived but little benefit from the preliminary steps you have taken in your education, if you have been altogether inattentive to this interesting fact. From the first dawn of reason you have been observing it in the qualities of matter, the growth of every plant, and the habitudes of animals. There is a law of nature for all; and though, in boyhood, they struck you but as curious or amusing, yet as reflection has poured its flood of light upon the mind, they have assumed a deeper and more enduring interest.

Permit me however to place this matter before you more distinctly, and in a light, which if it can boast of nothing new, may enable you at least to perceive more clearly, the important inferences I intend to draw from it.

Natural philosophy, in its most general sense, is the science of those laws according to which nature operates through all her works; and the settled methods *according to which* she works, are called *the laws of nature*. The term is indeed used very commonly in a more restricted sense; but it is as accurately applicable to the history of a plant or a flower, to the habitudes of an animal, or the structure and

organization of its frame, as to the laws of planetary motion, the principles of mechanics, or the phenomena of light and electricity. Let us illustrate the matter by a few examples.

Take first the instance of crystallization. All crystalline substances have their own peculiar crystals. It is one of the laws of their nature. Thus calcareous spar crystallizes in rhombohedrons, *fluor spar* in cubes, and quartz in six sided pyramids; and these forms are so peculiar to those substances, that *fluor spar* never crystallizes in rhombohedrons or six sided pyramids, nor calcareous spar nor quartz in cubes.—Turner's Chem. 409. Next take the *elective* attractions, all of which have their peculiar affinities, so unerring are they, that man's boasted wisdom appeals to them as *tests*. And here is a magnet! Though inanimate and senseless, it can, by the law of its nature, tell iron from silver or gold. It tells intuitively a pin from a needle! And so with electricity. The very lightning of heaven distinguishes between a metal and an electric. It is a law of its nature. Let us pass to the vegetable creation.

Here is a flower! It is denominated the heliotrope or sunflower, from that tendency it has to turn its calyx to the sun. Place it where you will within the influence of its beams, and

It turns to its God with each varying hour,
And follows its idol throughout his career.

This is the law of *its* nature. Take this vine! It is the hop. It winds itself around the stake for its support, as it will by instinct. But what is more, it always twines from right to left. Here is another. It is a bean; twining indeed like the other, but always from left to right. It is the law of *their* respective natures. Do as you will, you cannot make them grow otherwise. Mount a little higher in the scale of being. Take the animal creation. All have the peculiar laws of their respective natures. The flocks and the herds are bloodless and gregarious: the lion

and the tiger are solitary and cruel. Yet all have *one* common principle at least, in all their natures; from the maternal hen to the fierce hyena and the ravening wolf. The natural storgee or love of their young, animates the whole, from the instant the whelp is ushered into life, or the tender chick is liberated from its shell. Look next abroad through nature,

“To the range of planets, suns and adamantine spheres,” and contemplate the wondrous law that rules the whole. ’Tis gravitation! whose universal power governs all creation, from the apple falling to the ground, to the mighty orbs, that wheel their unerring course through azure fields of air. *They* obey a law that’s common to them all. They give the crowning proof that all creation lives by nature’s laws;—laws which proceeding from Almighty power defy the vain attempts of man to change them.

Perhaps I may be asked *Quo tendunt hæc?* To what inferences would you have these facts to lead us? To this plain inference. If there be a law for all other created things, *why not for man!* “for man, so noble in reason, so infinite in faculties; in form and moving so express and admirable; in action so like an angel, in apprehension so like a god; the beauty of the world, the paragon of animals.” For him above the rest, whom human pride has taught us to regard as the peculiar object of the favour and the care of heaven’s all-ruling sire, must that Almighty Being have established laws which should govern his existence. These are to him the laws of nature. They are laws for him whether we look upon him as a wandering savage, in his solitary cave, or as the polished and luxurious tenant of a palace in the midst of a crowded city. They speak to the latter indeed in a voice by far more audible, and to an ear far more acute than the blunted senses of the brutal man of nature. To the man of civilization and society *consciousness* points out the paths

of duty ; and the *stings of conscience* force him to pursue it.

Nor is it to his structure and organization or to his appetites or propensities alone that these laws have been confined. A nobler nature having been implanted in him than is given to the brute, other laws to govern it must also be inferred ; for we have already seen, that 'tis the universal attribute of being that all that has existence must have a law appropriate to its nature. Of this indeed we have perfect consciousness, and none can look into their hearts without a sense of inborn duty there. It is of itself evidence enough of the real existence of a moral sense—innate and implanted in the human heart. What better evidence *can* we have of any thing, than that of *our consciousness* ? What evidence have we of the objects of sense, but the consciousness which is derived from the information of the senses ? What evidence have we of the existence of our appetites, and our passions, of our love and our hatred, of our fears and our sympathies, of our wishes and our hopes, than consciousness itself ? If I have then in my heart, a conscious love of what I consider right, and a correspondent abhorrence of what I consider wrong, I have the same evidence of that moral sense, that I have of all other objects of consciousness. I must therefore believe in its existence, though I may confess that in its operations it is ever subject to be deluded. I may also readily admit, that it may exist in different degrees in different individuals, in like manner as the acuteness of the senses and the powers of the mind and the benevolence of the temper are more remarkable in one than in another. If indeed *self evident* truths are to be received as axioms, *self consciousness* is the best assurance we can have of truth : and if in all men there is even a *scintilla* of the sense of right and wrong, the moral sense is established beyond the danger of contradiction.

I am well aware that, in these opinions, I run

counter to the favourite notions of those who so earnestly contest what they call the existence of a moral sense. It is not, my purpose to enter into the speculations in which ethical writers have indulged on this subject, but I take leave to remark, that even admitting there is no such *innate* moral sense as is so vehemently contested by Mr. Paley and others, it by no means follows that the constitution of man is not such that by the due use and application of our natural faculties as we grow up, and become adult, the ideas of right and wrong, the moral sense of order, justice, and all the other virtues will not inevitably spring up in our bosoms. It does not follow that the sense of right and wrong is not implanted in the heart by nature, because it cannot be called into action without an object. The diamond is not less a diamond because it is yet unfashioned by the lapidary. It does not follow that there was no such sense in the bosom even of the wild boy caught in the woods of Hanover, because in his uninstructed state, he would feel no horror at the treachery of Toranius. The *exercise* of the moral *judgment* indeed, implies a just comprehension of the subject on which it is to be pronounced. The existence of the moral feelings does not. In the case of the wild boy of Hanover, it is obvious that until his mind was duly informed of the relation between Toranius and his father, and until he was taught by reflection the peculiar tenderness and filial piety which that relation implied, it would be impossible, (even if the existence of his moral sense be admitted) that he could feel the sentiment of horror at the baseness of the son, which every cultivated understanding must feel, when the incident is recited. But to deny the implanted sense of right and wrong for that cause, would be about as reasonable as to deny that the passion of love is innate in the heart, because it does not spring up until maturity and until an object is presented which is lovely to the eye. It is as reasonable as to sup-

which the advantages of the social union are the smallest. As society advances, the relations among individuals are continually multiplied, and man is rendered the more necessary to man: But it may be doubted, if, in a period of great refinement, the social affections be as warm and powerful as when the species were wandering in the forest.

“ Besides, it does not seem to be easy to conceive in what manner Hobbes’ supposition could be realized. Surely, if there be a foundation for any thing laid in the constitution of man’s nature it is for family union. The infant of our species continues longer in a helpless state, and requires longer the protecting care of both parents, than the young of any other animal. Before the first child is able to provide for itself a second and a third are produced, and thus the union of the sexes, supposing it at first to have been merely casual, is insensibly confirmed by habit, and cemented by the common interest which both parents take in their offspring. So just is the simple and beautiful statement of the fact given by Montesquieu, “ That man is born in society, and there he remains.”

“ From these considerations, it appears that the social union does not take its rise from views of self-interest, but that it forms a necessary part of the condition of man from the constitution of his nature. It is true, indeed, that before he begins to reflect he finds himself connected with society by a thousand ties; so that, independently of any social instinct, prudence would undoubtedly prevent him from abandoning his fellow creatures. But still it is evident that the social instinct forms a part of human nature, and has a tendency to unite men even when they stand in no need of each other’s assistance. Were the case otherwise, prudence and the social disposition would be only different names for the same principle, whereas it is matter of common remark, that although the two principles be by no

means inconsistent when kept within reasonable bounds, yet that the former, when it rises to any excess, is in a great measure exclusive of the latter. I hinted too already, that it is in societies where individuals are most independent of each other as to their animal wants, that the social principles operate with the greatest force.

According to the view of the subject now given, the multiplied wants and necessities of man in his infant state, by laying the foundation of the family union, impose upon our species, as a necessary part of their condition, those social connexions which are so essential to our improvement and happiness. And, therefore, nothing could be more unphilosophical than the complaints which the ancient Epicureans founded upon this circumstance, and which Lucretius has so pathetically expressed in the following verses :

“ Tum porro puer, ut sævis projectus ab undis
Navita, nudis humi jacet, infans, indigus omni
Vitali auxilio, cum primum in luminis oras
Nixibus ex alvo matris natura profudit :
Vagituque locum lugubri complet, ut æquum est,
Cui tantum in vitâ restat transire malorum.”*

The philosophy of Pope is in this respect much more pleasing and much more solid :

“ Heaven forming each on other to depend,
A master, or a servant, or a friend,
Bids each on other for assistance call,
‘Till one man’s weakness grows the strength of all.
Wants, frailties, passions, closer still ally
The common interest, or endear the tie.
To these we owe true friendship, love sincere,
Each home-felt joy, that life inherits here.”†

The considerations now stated afford a beautiful illustration of the beneficent design with which the physical condition of man is adapted to the principles of his moral constitution ; an adaptation so stri-

* Lib. v. l. 223.

† See on this subject the Moralists of Lord Shaftesbury.
2*

pose, that there is no inborn sense of beauty and deformity in a blind man, merely because the film upon his pupil, or the existence of a cataract, has obstructed his vision, until his blindness has been removed by the dexterity of the oculist. The sensibility of the retina is *there*, though it was never called into exercise by the solar ray, till the operation of the surgeon. I hold therefore with those philosophers who affirm the existence of a moral sense, or sense of right and wrong implanted in the heart of man. I adopt it as the basis of all my reasonings. I do not affirm indeed that it enables us in all things *rightly to decide* upon what is right or wrong in human conduct. *That* depends, not upon the moral sense, but mainly upon the judgment; and that judgment is subject to be warped and influenced by various considerations, besides that it is liable to the inevitable defect of human imperfection. We should not deny to the judicial magistrate a *sense* of right and wrong, because he often errs. We concede to him the best intentions—the strongest love of right and hatred of wrong—even at the moment he decides against our own convictions. It is no objection then to the existence of a moral sense, that it wants uniformity in its operations; e. g. that the exposure of infant children or decrepid parents is in one age or country a virtue and in another a vice. In both the moral sense is just the same. In both, the *object* is the same—the promotion of what is held to be a good, and therefore right; the error is in the reasoning upon the matter submitted to the judgment; for *reasoning* may well vary our sentiments with respect to particular actions, and their influence upon that general happiness, which a just sense of right and wrong ever prompts us to promote; but it never could *create* our *sense* of right and wrong, since that is given us by him who gave us all things. As Cicero has well expressed it; it is “*non scripta sed nata lex; ratio summa, insita in natura; quam nondidicimus, ac-*

cepimus, legimus, verum ex natura ipsa, arrepuimus, hausimus, expressimus; ad quam non docti sed facti; non instituti sed imbuti sumus."

This innate sense of right and wrong, however, though implanted in the human heart and constituting a law of our nature, is still susceptible of improvement by judicious attention and cultivation. Like the faculties of the mind, or the corporeal senses, its sensibilities on the one hand may be largely increased by exercise and sedulous care, while on the other, its just determination as to what is really right or wrong, its judgments upon the influence, effect, and tendency of human actions, and its consequent decision upon the propriety of an act, must always of necessity be mainly influenced by example, authority, sympathy, habit, and the usages, customs and opinions of the community to which we belong. Hence the true mode of ascertaining what is morally right is to enquire what the *reason*, the *cultivated reason* of mankind must necessarily pronounce on the matter in question. Hence too the necessity of the most scrupulous examination of every question of morals and of law; for though the moral *sense* be true as the needle to the pole, its polarity may be disturbed and controled by what is extraneous; and hence it arises that we are so often compelled to draw the broad line of distinction between the nature of the action, and the motives of the actor.

On this corner stone then I rest, that there is in man a moral sense of right and wrong; and as that sense must have been implanted, to lead us to pursue the good and eschew the evil, it seems but a fair corollary from its existence, that the first law of our nature is, obedience to its dictates. Man too being a creature endued with reason, that reason must be his guide in deciding between what is right and what is wrong, and in pointing out those rules of moral conduct, or in other words, those laws of nature, to

which it must ever be his duty to conform. In making this decision it well may happen that human reason, defective as it is, may sometimes err; and hence those variances between the moral codes of different nations, which have been made with so little justice the fruitful theme of argument and objection to the theory of a moral sense.

What tests then may we safely adopt for the discovery of those laws of our nature to which we owe obedience and which municipal law itself should always respect. There is one at least to which we safely may resort. It is *universality*. Where throughout the world, both savage and civilized, a principle has been adopted as a law of our nature; where the municipal institutions of every people both ancient and modern have recognised its authority, we may safely take it as one of the great principles founded in the nature of man. Such for instance is the law of self preservation. This is indeed familiarly styled the first law of nature. It is doubtless as universal as human existence. It prevails in a state of nature, if indeed such a state ever can subsist: it prevails among the savages of the desert, and is recognised, *sub modo*, by the laws of every civilized country. Supposing a state of nature, or supposing (what may happen and often has happened) a set of men cast by shipwreck on a desert island, where they are bound together by no common tie, and neither owns a superior in another, there could not be a doubt that the law of self-preservation must be the prevailing law among them. Could we suppose it otherwise, could it be admitted that one could have no right to defend himself against another, then, as all in that condition are equal in regard to rights, none would have the right of self defence. So that this absurdity would follow; that though I might attack others with impunity, (since by the hypothesis they would have no right to defend themselves) yet I would not be justified in defending myself from *their* attacks. In other

words I might attack *them* but not defend *myself*. Upon no principles could this be regarded as a reasonable rule of right and wrong. The right of self defence, (and with it of self preservation) may without danger of controversy therefore be laid down as the first law of nature.

Nor is it altogether lost by entering into society. It is limited, controled and regulated indeed for the purpose of preserving the peace of society from the pernicious consequences of private broils and civil contention. *Society* steps in and fulfilling her engagement of protection affords her remedies to the party injured, sometimes by prevention and sometimes by punishment of the wrong doer. But still it permits the unrestrained exercise of the natural right of self defence, in all those cases of extreme character, where *life* is in danger, and no safety is to be found, except in the death of the assailant. And even in less heinous cases, if I am assaulted, I am left to the exercise of the natural right of self defence, provided I do not carry my resistance farther than the attack may render necessary.

Besides the principle of self preservation, there are I conceive some others not less universal. The first of these is the natural inclination between the sexes, which may be considered as the first germ of that social principle of which we shall presently speak. From this, next springs the relation of parent and child; that natural affection, which, with the exception of a few monsters of our race, warms the breast of every parent. The imbecility and long continued incapacity to help itself, of the young of the human species, while it seems to give additional warmth to parental tenderness, carries with it the strongest evidences of duty on the part of the parent. This duty constitutes the natural law which binds the parent to the maintenance and protection of his child; and this law would seem to be as universal as the law of self defence; save, that in some nations of antiquity

and among some savage people, the exposure of infants has been practised from false notions of tenderness to them. We shall have occasion to point out hereafter the correspondencies of this natural law with our civil institutions.

A third point, on which mankind throughout the world appear to have agreed, is the existence of a right of property. In the light in which we are now viewing the subject, the *plus* or *minus*, is not the matter of consideration. The conception of the right of property, however insignificant, goes to the establishment of another principle, from which springs immediately the natural law of property. It is not our business *here*, to expend much time upon this topic. My only concern, at present, is to shew that there are laws of nature which grow out of our very constitution, and that those laws have so universal, or at least so general a consent of the human race, that there can be but little reason to doubt, that the principles upon which they are founded are planted in the heart, and the laws themselves obligatory upon the conscience. Hence it is of little importance that there have been societies of men who have established a community of goods among themselves and will not admit the existence of a separate property. Such instances are but anomalies which ought not to affect our conclusions; and what is more, even among them the law of property is admitted and insisted on. For though it is held in *common among themselves*, the *society* holds it in *exclusion of all others*; thus affirming *in extenso* the principle for which we are contending. Moreover the portion which each takes of the common stock for his own use, becomes exclusively his, and thus far the law of property has place even among themselves.

In searching out the foundations of natural law, there is none more extensive, nor in my opinion more legitimate, than the tendency to society which is implanted in the heart of man. Waiving the influence

of those natural affections of the parent to the child, and of the male to the female of our race, the slightest observation will teach us, that we are led by a natural and instinctive desire to associate with our species.—The existence of this strong propensity in *other* animals is too apparent to be denied. In some indeed it would seem to be of the simplest character; to consist only of the mutual desire of herding together, frequenting the same pastures and drinking of the same brook. Such is the case with those domesticated by man. But look to the forest, where they are found in their native wildness, and in addition to the manifestations of this instinct seen among domestic animals, the social principle is discovered to be developed by other extraordinary traits. There are some who seem to be associated in little commonwealths for purposes of labor, as the beaver and the otter, and the bee and the ant; while many act together for purposes of defence forming themselves in their peculiar array, and making battle against an assailant under the command of the most experienced and intrepid of their band. Such is the case of the wild horses of the prairie, who feed together in their pastures and on the approach of an enemy close in thick array against the common foe, wheeling their squadrons as their captain leads, and attacking or retreating at the signal which he gives. His snort sounds the charge like a trumpet, or announces the retreat when resistance is in vain. Such too is the case with the buffalo and wild cattle of the west among whom the same concert of action is preserved for purposes of defence. But to come nearer home, who has not seen the same thing manifested by our common swine when they have become wild by roaming through the woods. Attack them and their ranks at once are serried, while some fierce veteran boar will occupy the van lead on the battle or bring up the rear when driven to retreat. And these things man remarks, and comments on the intelligence they dis-

play. Intelligence ! Is it then *intelligence* in them that leads to such results, and can it be that far superior intelligence in us can be without a like effect ? It cannot be. Man is a social not less than a rational animal. What has been falsely called a state of nature—a state of solitude and separation from all our species—is an unnatural state. It never has existed and it never can exist. The curious temper of metaphysical philosophy in all its search for some example to justify its favorite abstraction, has never found but one—the wild boy in the woods of Hanover. And he can furnish argument for nothing, for he knew no other being.

I have already said that whether we look to the scriptural history of our race, which represents the species in the beginning of all things bound together by the same tender ties which now unite us in society ; or speculate on the nature and character of man, his wants, his weakness and his affections ; or observe the workings of his feelings, from the dawning of reason to its full meridian, we must in candor acknowledge the existence of the social instinct in our species. “Attend only” says an intelligent and acute observer, “to the eyes, the features and the gestures of a child upon the breast, when another child is presented to it. Both *instantly*,—previous to the possibility of instruction or habit, exhibit the most evident expressions of joy. Their eyes sparkle, and their features and gestures demonstrate, in the most unequivocal manner, a mutual attachment.” This early demonstration of social feeling, in the ingenuous grows with their growth and strengthens with their strength. It proves the social state to be the natural state of man. Man has *always* been found in a social state, and one of the greatest punishments that can be inflicted upon him, is solitary confinement, or banishment to some wretched land, where the miserable exile never shall behold again the human face divine. I am well

aware of the cases of the ascetic and the misanthropic. But upon the first we habitually look as a gloomy fanatic or enthusiastic devotee, and upon the last as an unnatural monster, in whose bosom the milk of human kindness flows not. Philosophy must not draw her examples or vary her conclusions from the cases of the madman or the brute.

I cannot forbear to engraft on what I have said the just and beautiful remarks of the author of the "Philosophy of the Active and Moral Powers of Man," premising however that I do not at this time enter into the question whether the social principle is selfish or disinterested.

"The question with respect to the social or the solitary nature of man seems to me to amount to this, whether man has any disinterested principles which lead him to unite with his fellow creatures; or whether the social union be the result of prudential views of self-interest, suggested by the experience of his own insufficiency to procure the objects of his natural desires. Of these two opinions Hobbes has maintained the latter, and has endeavoured to establish it by proving, that in what he calls the state of nature every man is an enemy to his brother, and that it was the experience of the evils arising from these hostile dispositions that induced men to unite in a political society. In proof of this he insists on the terror which children feel at the sight of a stranger; on the apprehension which, he says, a person naturally feels when he hears the tread of a foot in the dark; on the universal invention of locks and keys; and on various other circumstances of a similar nature.

"That this theory of Hobbes is contrary to the universal history of mankind cannot be disputed. Man has always been found in a social state; and there is reason even for thinking, that the principles of union which nature has implanted in his heart operate with the greatest force in those situations in

which the advantages of the social union are the smallest. As society advances, the relations among individuals are continually multiplied, and man is rendered the more necessary to man: But it may be doubted, if, in a period of great refinement, the social affections be as warm and powerful as when the species were wandering in the forest.

“ Besides, it does not seem to be easy to conceive in what manner Hobbes’ supposition could be realized. Surely, if there be a foundation for any thing laid in the constitution of man’s nature it is for family union. The infant of our species continues longer in a helpless state, and requires longer the protecting care of both parents, than the young of any other animal. Before the first child is able to provide for itself a second and a third are produced, and thus the union of the sexes, supposing it at first to have been merely casual, is insensibly confirmed by habit, and cemented by the common interest which both parents take in their offspring. So just is the simple and beautiful statement of the fact given by Montesquieu, “ That man is born in society, and there he remains.”

“ From these considerations, it appears that the social union does not take its rise from views of self-interest, but that it forms a necessary part of the condition of man from the constitution of his nature. It is true, indeed, that before he begins to reflect he finds himself connected with society by a thousand ties; so that, independently of any social instinct, prudence would undoubtedly prevent him from abandoning his fellow creatures. But still it is evident that the social instinct forms a part of human nature, and has a tendency to unite men even when they stand in no need of each other’s assistance. Were the case otherwise, prudence and the social disposition would be only different names for the same principle, whereas it is matter of common remark, that although the two principles be by no

means inconsistent when kept within reasonable bounds, yet that the former, when it rises to any excess, is in a great measure exclusive of the latter. I hinted too already, that it is in societies where individuals are most independent of each other as to their animal wants, that the social principles operate with the greatest force.

According to the view of the subject now given, the multiplied wants and necessities of man in his infant state, by laying the foundation of the family union, impose upon our species, as a necessary part of their condition, those social connexions which are so essential to our improvement and happiness. And, therefore, nothing could be more unphilosophical than the complaints which the ancient Epicureans founded upon this circumstance, and which Lucretius has so pathetically expressed in the following verses :

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Bids each on other for assistance call,
Till one man's weakness grows the strength of all.
Wants, frailties, passions, closer still ally
The common interest, or endear the tie.
To these we owe true friendship, love sincere,
Each home-felt joy, that life inherits here.”†

The considerations now stated afford a beautiful illustration of the beneficent design with which the physical condition of man is adapted to the principles of his moral constitution ; an adaptation so stri-

* Lib. v. l. 223.

† See on this subject the Moralists of Lord Shaftesbury.

king, that it is not surprising those philosophers, who are fond of simplifying the theory of human nature, should have attempted to account for the origin of these principles from the habits which our external circumstances impose. In this as in many other instances, their attention has been misled by the spirit of system from those wonderful combinations of means to particular ends, which are every where conspicuous in the universe. It is not by the physical condition of man that the essential principles of his mind are formed ; but the one is fitted to the other by the same superintending wisdom which adapts the fin of the fish to the water, and the wing of the bird to the air, and which scatters the seeds of the vegetable tribes in those soils and exposures where they are fitted to vegetate. It is not the wants and necessities of his animal being which *create* his social principles, and which produce an artificial and interesting league among individuals who are naturally solitary and hostile ; but, determined by instinct to society, endowed with innumerable principles which have a reference to his fellow creatures, he is placed by the condition of his birth in that element, where alone the perfection and happiness of his nature are to found.

“In speaking of the lower animals, I before observed, that such of them as are instinctively social discover the secret workings of nature even when removed from the society of their kind. This fact amounts in *their* case to a demonstration of that mutual adaptation of the different parts of nature to each other which I have just remarked. It demonstrates that the structure of their *internal* frame is purposely adjusted to that *external* scene in which they are destined to be placed. As the lamb, when it strikes with its forehead while yet unarmed, proves that it is not its weapons which determine its instincts, but that it has pre-existent instincts suited to its weapons, so when we see an animal deprived

of the sight of his fellows cling to a stranger, or disarm, by his caresses, the rage of an enemy, we perceive the workings of a social instinct, not only not superinduced by external circumstances, but manifesting itself in spite of circumstances which are adverse to its operation. The same remark may be extended to man. When in solitude, he languishes, and by making companions of the lower animals, or by attaching himself to inanimate objects, strives to fill up the void of which he is conscious. "Were I in a desert," (says an author who, amid all his extravagances and absurdities, sometimes writes like a *wise* man, and, where the moral feelings are at all concerned, never fails to write like a *good* man)—"Were I in a desert, I would find out wherewith in it to call forth my affections. If I could not do better, I would fasten them upon some sweet myrtle, or seek some melancholy cypress to connect myself to; I would court their shade, and greet them kindly for their protection. I would cut my name upon them, and swear they were the loveliest trees throughout the desert. If their leaves withered, I would teach myself to mourn, and when they rejoiced, I would rejoice along with them."

"The Count de Lauzun was confined by Louis the Fourteenth for nine years in the Castle of Pignerol, in a small room where no light could enter but from a chink in the roof. In this solitude he attached himself to a spider, and contrived for some time to amuse himself with attempting to tame it, with catching flies for its support, and with superintending the progress of its web. The jailor discovered his amusement, and killed the spider; and the Count used afterwards to declare, that the pang he felt on the occasion could be compared only to that of a mother for the loss of a child.*

* In Delille's poem on *the Imagination*, the same anecdote which is here told of the Count de Lauzun is attributed to Pellisson, a celebrated literary and political character in the

"This anecdote is quoted by Lord Kames in his *Sketches*, and by the late Lord Auckland in his *Principles of Penal Law*. It is remarkable that both these learned and respectable writers should have introduced it into their works on account of the shocking incident of the jailor, and as a proof of the pure and unprovoked malice of which some minds are capable, without taking any notice of it as a beautiful picture of the feelings of a man of sensibility in a state of solitude, and of his disposition to create to himself some object upon which he may rest those affections which have a reference to society.

"It will be said that *these* are the feelings of one who has experienced the pleasures of social life, and that no inference can be drawn from such facts in opposition to Hobbes. But if they do not prove in man an instinctive impulse towards society prior to experience, they at least prove that he feels a delight in the society of his fellow creatures, which no view of self-interest is sufficient to explain.

"It does not belong to our present speculation to illustrate the importance of the social union to our improvement and our happiness. Its subserviency to both, (abstracting entirely from its necessity for the complete gratification of our physical wants) is much greater than we should be disposed at first to apprehend. In proof of this, it is sufficient to mention here its connexion with the culture of our intellectual faculties, and with the developement of our moral principles. Illustrations of this may be drawn from the low state in which both these parts of our nature are generally found in the deaf and dumb, and from the effects which a few months' education sometimes has in unfolding their mental powers. The pleasing change which in the meantime takes

reign of Louis the Fourteenth, who was confined four years in the Bastille, on account of his connexion with the disgraced minister *Foucquet*.

place in their once vacant countenances, when animated and lighted up by an active and inquisitive mind, cannot escape the notice of the most careless observer."

In what has been said in relation to the *law* of nature, or that rule of rectitude implanted in the heart and pointed out by our nature, it will be perceived that I have drawn no aid from the authority of the scriptures. I have considered it not only feasible, but proper, that the great principles of right and wrong should be treated apart from the manifestation of them in the holy writings. "If it were otherwise how could men of perfectly different religions, *deal* or *reason* with each other, on moral subjects? To what common principles could they appeal in their differences?" The Chinese, and the Turk, and the Hindoo, the followers of Confucius, of Mahomet and of Brahma,—even the Hottentot and the savage of our forests all acknowledge some rule of right and wrong, while they recognize no authority in the precepts of our holy religion. With all of them, the christian nations deal and have intercourse, and in those dealings they must appeal in vain to the laws of Moses or the precepts of their gospel. Nay farther, according to the popular chronology, the Jewish lawgiver flourished 2500 years after the creation; and before his day, (and of course before the scriptures even of the Old Testament) eighty generations of men had passed away, (I estimate the generation at 30 years) and myriads had successively filled the eastern world. We cannot doubt that these, like us, had deeply planted in *their* hearts, some rule of moral rectitude, although they lived before the light of Jewish theocracy, and more than forty centuries before the blaze of christian revelation, and the pure and humanizing influences of its divine author, had insinuated into the heart of man the beneficent principle of universal benevolence.

It has moreover been well observed by a distinguished writer, (McIntosh—183) that if there were no foundation for morality antecedent to revealed religion, we should want that important test of the conformity of revelation to a pure morality by which its claim to a divine origin is to be tried. The *internal* evidence of religion necessarily presupposes such a standard. The christian contrasts the precepts of the koran, with the pure and benevolent morality of the gospel. The Mahometan claims with justice a superiority over the Hindoo, inasmuch as the Mussulman religion inculcates the moral perfection of one supreme ruler of the world. The ceremonial and exclusive character of Judaism has ever been regarded as an indication that it was intended to pave the way for a universal religion,—a morality seated in the heart and a worship of sublime simplicity. These discussions would be impossible unless morality were, previously proved or granted to exist.” “It is absolutely essential to ethical science that it should contain principles the authority of which must be recognized by men of every conceivable variety of religious opinions.” When to these suggestions are added the consideration, that in the division of the subjects of instruction, the connection of religion and morality falls within the department of the divine, and is or ought to be the topic of weekly illustration; while my humble labours are devoted to the correspondencies of moral and municipal law alone, I shall be readily excused, I am sure, for not venturing beyond the limits which have been judiciously assigned me, and for leaving to others far more competent than myself, the pleasing task of displaying the beautiful harmony between a pure system of ethics and the precepts of the gospel.

LECTURE II.

GENTLEMEN :

It has been my object in what has been said to establish the existence of a moral sense of right and wrong ; or in other words, a sense of moral rectitude implanted in the heart and susceptible of being brought into exercise under the guidance of our reason. I have also endeavoured to demonstrate, that there are certain moral tendencies in our nature which are universal in their operation and which may, in one sense of the expression, be looked upon as *laws* of our nature, as they influence and govern us in all things. These were, the desire of self preservation, the natural inclination between the sexes, the natural affection of the parent for his child, the inclination for social intercourse and the principle of property. But these are not only *parts* of our nature, and therefore constitute with man his great principles or *motives of action*, but they are in truth the great foundations upon which *our moral duties* rest, and are therefore the sources of the law of our actions, which in its strictest sense may be denominated the law of nature. Before however we expatiate upon this interesting branch of our subject, it will be best to settle some preliminary matters which may serve to facilitate our subsequent progress.

I have said in our last lecture that notwithstanding the existence of a moral sense, it does not follow that it will enable us in all things *rightly* to *decide* upon what is right or wrong in human conduct. The different customs and laws of different nations in relation to the same matter, abundantly proves

this, and have indeed been the chief foundation of the argument against the existence of a moral sense. It has been said with great truth that there is scarcely a single vice which in some age or country of the world has not been countenanced by public opinion ; that in one country it is esteemed an office of piety in children to sustain their aged parents, in another to despatch them out of the way ; that suicide in one age of the world, has been heroism, and in another is felony ; that theft, which is *punished* by most laws, was, by the laws of Sparta not unfrequently *rewarded* ; that the promiscuous commerce of the sexes, although condemned by the regulations and censure of all civilized nations, is practised by the savages of the tropical regions, without reserve, compunction, or disgrace ; that crimes, of which it is no longer permitted us even to speak, have had their advocates among the sages of very renowned times ; that, if an inhabitant of the polished nations of Europe is delighted with the appearance, wherever he meets with it, of happiness, tranquillity, and comfort, a wild American is no less diverted with the writhings and contortions of a victim at the stake ; that even amongst ourselves, and in the present improved state of moral knowledge, we are far from a perfect consent in our opinions or feelings ; that you will hear *duelling*, alternately reprobated and applauded, according to the sex, age, or station of the person you converse with ; that the forgiveness of injuries and insults is accounted by one sort of people, magnanimity, by another meanness ; that in the above instances, and perhaps in most others, moral approbation follows the fashions and institutions of the country we live in ; which fashions also, and institutions themselves, have grown out of the exigencies, the climate, situation, or local circumstances of the country ; or have been set up by the authority of an arbitrary chieftain, or the unaccountable caprice of the multitude—all which, it is observ-

ed looks very little like the steady hand and indelible characters of nature.

Notwithstanding the great apparent force of these remarks they prove at most, what cannot be denied, either that the judgment of the actor may be misled, or that the voice of conscience may be suppressed or disregarded. They do not disprove the existence of a moral sense of right and wrong, since many of the actions here detailed have proceeded only from *mistaken judgment*, while others have been warped and influenced by false views and ungoverned passions, which have smothered, for a while, the natural dictates of the heart.—It behoves us therefore to look narrowly into the matter, and to ascertain by *what guide* this moral sense of ours is directed, and by what *test* we should be governed in deciding upon the conformity of human actions to the great law of our nature.

1. First then, let us enquire, what is to be our guide in this pursuit after moral rectitude. The answer is “the light of reason.” It is the business of our reason to examine and to find out those rules or laws of nature by which we should be guided, and those rules of conduct which are dictated by an entire submission to the inborn feeling of moral rectitude. Reason is as plainly given to us for this purpose, among others, as the eye is given for the purpose of sight. It is the eye of the mind, which is to look out for us, in order to direct our paths in the pursuit of what is good and in flying from what is evil. If we do not exercise it to this purpose, it is of little use. It cannot have been implanted in us but with the intent that it should be exercised as our guide and our director. There is indeed no other guide for man. Beings who have reason, to discover how to regulate their affections and their actions, so as to secure to themselves that happiness which is the great end and aim of their existence, have no other director than this. Beings without the ration-

al faculty, act under the continued impulse of their instincts,—their natural appetites and affections. But man indued with reason to discover the good from ill; man invested with an intellect that can pierce futurity, and trace the consequences of his actions, follows not blind instinct as *his* guide. His appetites and desires and particular affections are not, as with the brute, *his* rule of conduct. They are indeed the motive principle which impels, but reason at the helm must give them their direction. So far from being our guides, the affections themselves must ever be subjected to the guiding principles of our reason. *That* claims superiority for itself, and speaks to us in the language of authority. We recognize it as our master. The good obey it, though the bad rebel. Such is our nature that the greatest inward satisfaction of the virtuous man depends upon the approbation of his reason; and the consciousness of having acted in conformity to its dictates. On the other hand, we have cause to believe, that even the wicked are tormented by the consciousness of despised and contradicted reason. It is the law of our nature then that we should obey it. It is not less a law of duty that we should maintain it as the governing principle of all our affections and pursuits, and that we should cultivate, inform and enlighten it by all the means in our power and above all by patient and deliberate thinking.*

* "Crimes committed through ignorance are only excusable when the ignorance is involuntary: for when the cause of it lies within ourselves it is then justly punishable. The ignorance of these laws which all may know if they will, does not excuse the breach of them; and neglect is not pardonable where attention ought to be bestowed. But perhaps it may be said we are incapable of attention. This however is our own fault—since the incapacity has been contracted by our continual carelessness, as the evils of injustice and intemperance are contracted by the daily commission of iniquity, and the daily indulgence in voluptuousness. *For such as our actions are our habits must become.*" Aristotle's *Ethics* by Gillies, p. 305.

The *great end of education ought to be to induce this sedate and deliberate temper*, and to give the mind the habit of reflection upon the subject of duty, and of weighing things maturely before it chooses and determines. When this is done it is not very difficult to point out the proper rules of action, or to decide upon the most eligible course of behaviour and of life, and the proper system for the government of the appetites and affections.

2. Our next enquiry is, "by what test shall we be governed in deciding upon the conformity of human conduct to the great law of our nature.

Connected with this enquiry is the question which has given rise to the animated discussions between the writers on ethics on the two systems of philosophy, the social and the selfish: The advocates of the latter tracing all actions as well as all duty to the selfish principle in man, of providing for his own happiness and security; and the advocates of the former contesting this theory not as it respects our motives and feelings only, but as it relates to the great principles of natural duty. Pursuing as we are engaged in doing, the subject of natural law not as a mere speculation but with practical views, it will obviously be of little importance that we should take part in these discussions with which you have already been familiar in the school of philosophy. If, as we think may be clearly shewn, the same laws of human *action* will result whether we consider human *obligation* to rest on the foundation of the selfish principle or not, it is obviously not worth our while to consume our limited time in so unprofitable a controversy. I shall therefore waive the discussion, confining myself to one or two simple remarks.

First, I will observe that the true question seems to be not whether man in society always acts from the selfish principle, but whether that principle is not the original foundation of *all right and obligation*. Admit that the selfish principle were the original

foundation even of society itself, it by no means follows that after entering into it, the motives of action should be grovelling and selfish. On the contrary if my happiness is promoted by society, and if as can be easily shewn, its welfare and perfection is advanced by the cultivation of all the generous, elevated and social feelings, it follows necessarily that after entering into this new relation, I must learn to forget *SELF* in all my actions, and to pursue that line of conduct which will benefit my kind without a confined and narrow view to my own immediate advantage. I must learn to obey those rules and maxims which the experience of ages has shewn to be promotive of the good of society, and to cultivate those amiable and benevolent feelings which have been found so essential in the intercourse of mankind instead of entering, upon every occasion, into new and independent speculations upon the probable consequences of every action. Upon no other principles can society get along;—upon no other principles could the individual himself get along. Life is designed for action—not altogether for dreamy speculations. The rules of action which have been deduced from the experience of mankind are so many *results*, which serve to dispense with the necessity of perpetual recurrence to first principles. Such a recurrence upon every occasion, where *action* is demanded, would be as absurd, as for the mathematician to pause in his transcendental calculations, that he may, by counting, learn whether two and two really make four. If therefore I concede the advantage of society to my happiness, and the importance of advancing its prosperity and perfection, I have only to follow as my guide, the principles, which wisdom and experience have for ages pointed out, as essential to its existence, and to cultivate those social feelings and motives, without which it would no longer continue to be a blessing.—But this is not all. However we may reason and however

we may theorize about the origin of society and the foundations of natural duty, we must all be sensible that there is in our hearts a moral sentiment which impels us to acts of benevolence and generosity, in which we can trace no selfish principle whatever. Our consciousness then—the best witness of that which is within us—bears testimony to the disinterestedness of many of our feelings, and negatives the theory of the total selfishness of the human heart. I cannot do better than refer the student to the beautiful remarks of Mr. Hume upon the subject. Vol. 2, page 349, 268.

But however cordially we may concur in the opinions of this author respecting acts of benevolence, friendship, generosity, and the like, we cannot concede that the natural law any more than the laws of society take cognizance of them. All acknowledge that they constitute what are very usually, though not very accurately, called *imperfect rights* and obligations. (I say "*not accurately*," because both right and obligation must be perfect and complete or they cannot exist at all.) In other words they are not enforced either by natural law or civil institutions. No man can, upon the principles of either, compel another to be generous, since all those duties which seem to spring from the social principle they leave to the workings of the heart alone. They look upon them as conferring no obligation, as creating no right, and therefore as furnishing no foundation for the action of law. They treat them as not commanded by, and therefore as creating no part of the law of nature or society: They regard them as actions voluntary and spontaneous and therefore not the object of compulsion; for generosity *by compulsion*, would cease to be generosity; whereas all law must *compel* or oblige, or it is not law; and by consequence what it does not compel or oblige is not an object of it; so that the right to demand charity and the duty of giving it are neither

of them enforced by natural law : and thus it is obvious, that natural law merely sustains those rights, and compels the performance of those duties which grow out of the right and obligation of self preservation, and the pursuit of our own individual happiness. *Municipal* law indeed is called in to enforce our *social* rights and duties, *natural* law commands alone the *preservation of ourselves*.

I have for these reasons, (and for others not necessary to be detailed,) ever been of opinion, that though the motives which prompt our actions in our intercourse with society are often of the most elevated and disinterested character, refined and purified from every selfish feeling, and dictated only by the most generous philanthropy, yet that the great natural *duty* of man was to *himself*, and his first *obligation* to secure his own safety and happiness ; and if I could be convinced that society was inimical to these essential objects, I should not hesitate to say that it was man's duty to abandon it ; and to seek, in retirement from his species, that bliss which an intercourse with them had failed to secure him. It can only be under the influence of similar opinions that the learned commentator on the laws of England distinctly pronounces, " that it is the sense of their *weakness* and imperfection that keeps mankind together. *That* demonstrates the necessity of this union ; and *that* therefore is the solid and natural foundation as well as the cement of civil society." The selfish principle, as the bond of union, cannot be more clearly avowed, than in these explicit remarks of this learned yet practical thinker ; and the more it is examined the more I am persuaded will its truth be conceded by all but the visionary and speculative metaphysician.

It remains then but to shew that upon the hypothesis of the selfish system as here explained, the same rules of action will result as upon the hypothesis of its adversaries. Nay more ; I am persua-

ded that the same generous and elevated and disinterested motives may be traced in the actions of the virtuous among men, upon the one theory as upon the other.

I have already said that, what is denominated the state of nature, never could have had existence. The nature of man, his helplessness in infancy and all his propensities contradict it. Taking the Mosaic account of creation, and man and woman both sprung full formed into life and constituted the first society in the connubial state. Very soon the farther relation of parent and child arose and thus from the beginning society had existence. Even the disciples of the Elian school, (I think it was) who held creation itself to be eternal, and the race of man to have existed without beginning, must have held society also to have existed, upon their own principles, from all eternity.

Be this as it may, the natural wants of man made society essential to him. The fulfilment of the great law of his nature, the duty of pursuing his happiness and the means of self preservation demanded that he should associate with his fellows. His natural propensities, moreover, were gregarious as I have already shewn, and his necessities conspired to lead him to indulge them. Born in weakness, his first wants were supplied by maternal tenderness. Taught by this to value even the simplest form of intercourse with his species, he would be the more ready to continue that intercourse and would soon be taught to associate still farther with others, for his support and his protection. He soon would find that while he could attain to but little comfort, and remained exposed to continual danger, from man and beast, in the isolated condition of the natural man, association with his fellows would add both to his safety and his enjoyment, and thus by degrees society would grow up: by tacit agreement as we may suppose, and without express contract. Such

indeed would be the natural course of things. But though by the necessities of their nature men were first compelled to seek mutual assistance, to add to their strength and multiply their enjoyments, they soon found this union and intercommunication in itself as agreeable, as it was necessary. In the more advanced stages of society we all are sensible of this. All will admit that the pleasures of social intercourse form a large source of our happiness. Acts of compassion, humanity, friendship, gratitude and benevolence, to say nothing of the endearments of married love and parental fondness, afford the most solid satisfaction to the mind. The generous bosom takes delight even in sympathy with distress; and dramatic exhibitions bear nightly testimony to this sensitive enjoyment. But if such be the warmth of social feelings even where the ingenuous nature has been rubbed off by the over polish of society, what must it be among *the children* of nature, banding together for defence against the savage, or uniting their strength for the erection of a shelter from the storm? You have an answer to the question even in the history of our frontiers. There the tie, which binds the intrepid backwoodsman to his fellow, is stronger than the tie of brotherhood. The bond of common *danger* is closer than the bond of common *blood*. And what is the nature of the association? *Una salus, commune periculum!* Each is bound to the other to stand by him to the death and pour his blood out freely for his friend. And who shall say that either violates the duty of self preservation in thus uniting in a common cause for mutual protection? Suppose he falls in the defence of his ally? Does he break the law of nature by exposure of his life? Far from it. The league was formed to save it: and though the fulfilment of its terms proves fatal in the end, yet a few considerations will shew the entire consistency of his conduct with natural duty.

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The condition of man in the supposed state of nature must have been destitute and miserable beyond the conception of a civilized being; a naked and homeless wanderer, shivering and shrinking from the tempest, subsisting upon acorns and undressed roots, or the bleeding carcasses of animals, and starting at the motion of every leaf from fear of the wild beast or his brother savage! it is impossible for human imagination to appreciate his sufferings. His solitude alone the least of all *his* ills, is held in social life a felon's punishment; and the solitary cell which he would deem a blessing, is the ultimate infliction of our penal laws for most of the atrocious crimes. How lively are our sympathies for wretches thrown upon a desert waste whose privations are but rarely half as great as his! The fictitious tale of Robinson Crusoe whose powerful appeal to the human sensibilities we all acknowledge, presents not a picture half so touching as the wretched outcast of nature. For *he* had some resource. His mind was stored with useful knowledge, drawn from his intercourse with his species. His labors were aided with implements taken from the ship, and his comforts were enlarged by articles fashioned by the skilful artisan, for the use and convenience of man.*

If such was the condition of man in the fancied state of nature, there was nothing so emphatically commanded by the law of self preservation, as association, (with all its risks and duties) with his fellow man. Society was the only remedy for his innumerable ills, and imperious duty demanded its formation.—But it could not well be formed without a sacrifice—without a *quid pro quo*—none could expect assistance who would not give it; none could hope for protection, who would refuse it in return. Men were of necessity then compelled to associate, under engagements express or tacit of mutual aid

* See 1 Adams' defence 141, extract from Machiavel.

and concert ; and from this small germ the social principle would naturally shoot out into innumerable branches. Hence springs the sacred obligation to hazard our lives for our country's good. In morality and in the conduct of human life, no principle is more true, than of two evils to choose the least ; and in entering into the social pledge of our lives for the protection of our fellows, we but incur the lesser hazard, to eschew the greater. The safeguards of the law are thrown around us for our protection even in the silent watches of the night, and in return for the happy security it gives, we owe our lives, (if it be necessary) to the great partnership of society. For, as has been eloquently said, "society is a partnership in all science ; a partnership in all art, a partnership in every virtue and in all perfection." It is a partnership too, for good and for ill ; for better and for worse ; for the day of safety and the hour of danger ; finally it is the partnership for the great and benevolent end of promoting the general happiness and good of all its members. Nay more : the social principle expands as it advances, and like its animating spirit—the spirit of benevolence, it knows no limit, but the limits of the human race. It stretches out its arms beyond the confines of its particular country and embraces in its beneficent influences all mankind. It extends the principles of the law of nature, which were but now the bond that united a few scattering savages for safety and protection, and they become the revered and sacred cord which binds together the great society of nations. For national law, young gentlemen, you will soon learn, is but the law of nature applied to the intercourse between the sovereigns of the earth, who own no common superior, yet bow with reverence to the sacred dictates of a common rule.

Society then being absolutely essential to the protection and happiness of man and the only sure and effectual means of that self preservation which it is

his first duty to secure, it follows as a necessary consequence that he is bound to protect and preserve society itself by all the efforts in his power. In doing this he preserves himself; in adding to its strength and prosperity he is but adding to the strength of that arm which is to be outstretched for his protection. It is to him the bulwark of his safety which it behoves him to defend at the risk, even of life; for he who would save his life must risk it, if his own defence demands it. Thus, the great law of self preservation and the pursuit of happiness is translated from himself to society, and the test of virtuous actions is found to be their tendency to promote the general good and happiness of all. And thus we see, that whether we trace the laws of human conduct to the principle of self interest, or admit with some philosophers that the true principle of all morality requires the annihilation of self, we shall still come to precisely the same result, in determining upon the merit or demerit of human actions. The *general happiness* and *good of all* is the true test, (on either hypothesis) of the merit of the *action* though it cannot be denied that there may be a wide difference between the merit of the actors themselves.

This leads me to observe in the language of Mr. Paley, that *actions* are in the abstract right or wrong according to their tendency; the *agent* is virtuous or vicious according to his design. "An action" says Mr. Stewart, "may be said to be absolutely right when it is in every respect suitable to the circumstances in which the agent is placed; or in other words, when it is *such*, as, with perfectly good intentions under the guidance of an enlightened and well informed understanding he would have performed. An action may be said to be *relatively* right, when the intentions of the agent are sincerely good, whether his conduct be suitable to his circumstances or not. It is the relative rectitude of

an action which determines the moral *desert* of the agent but it is its absolute rectitude which determines its *utility* to his worldly interests and to the welfare of society. And it is only so far as absolute and relative rectitude coincide that utility can be affirmed to be a quality of virtue."

To these expanded remarks on the difference between the virtue of an action and the virtue of the agent, I greatly prefer the plain, true and simple distinction of Mr. Paley; to which if we will adhere we shall have little reason for the complaint which has been made by Mr. Brown, of the confusion and apparent contradiction arising from the attempted distinction. There is certainly no difficulty in understanding that an act may promote the general good, while the intentions of the actor may justly exclude him from all approbation for having done it; and on the contrary an action may have a mischievous tendency, while the good intentions of the actor are beyond dispute. This is particularly discernible in reference to legislation, for though no reasonable doubt can generally be entertained of the *bona fides* of the legislative body, yet innumerable instances might be produced, I fear, of most mischievous legislation: and thus it is, we may have bad laws, while we impute no blame but ill directed judgment, to those who pass them.

Having established I trust upon uncontrovertible foundations, that the conformity of human conduct to the great law of our nature is to be tested by its tendency to promote the general good, and that reason must be our guide in this pursuit after moral rectitude, I must remark that there is much danger in too habitual a recurrence to this remote principle of action as the guide of our particular actions. It would be difficult even for the most sagacious and experienced to make upon every occasion accurate and proper estimates of the future consequences, of particular actions, so as in every variety of circum-

stances, to determine justly, which action would contribute most to augment the happiness and lessen the misery of all. The unaided reflection of no man would be adequate to such a task. The moment of action moreover is not the most propitious for these decisions. Our reasons are then too apt to be warped by the feelings which excite us. It is better therefore to lay down principles for our general government, drawn from the wholesome lessons which have been taught by the sagacity of the wise who have gone before us. Wisdom herself is in all things dependent upon the treasures of experience, but above all is she so dependent when she is called upon to determine upon the effects and consequences of human actions. And where are these treasures of experience to be found? They are to be found in the rules and principles of moral duty which have been building up for ages as the rules of human conduct. Instead therefore of attempting to decide for ourselves on every occasion, what according to our own short-sighted and imperfect estimate of consequences, should in any particular case be the rule of our conduct according to the law of nature, we must substitute other rules less general, subordinate to that law indeed, but founded upon it and admitting of a more ready and commodious practical application. Moreover, having entered into society we have submitted to the general sense, discretion and judgment, of the whole body of which it is composed, the determination of what will or will not promote the common good. To that determination it is our duty to submit. So that here we have at once in the positive law, a body of fixed and settled rules which serve as our guide, and which absolve us from the *necessity*, and restrict us from the *right* of consulting our own views in deciding upon our course of conduct. There are indeed many things about which human laws are silent, and which are therefore left to our

discretion and our judgment. Yet in these it is not less our duty to obey the great and leading principle of promoting the general good, and to follow in this pursuit of moral rectitude, the principles of morality and virtue which the experience of ages, and the wisdom of the sage and the general testimony of mankind, and the beautiful precepts of religion have prescribed as the rules of duty to ourselves and towards others. Piety to God, bounty to the poor, forgiveness of injuries, gratitude to benefactors, fidelity and tenderness to the partner of our lives and careful education of our children are some of the duties to *others* of this description: while temperance, moderation in our wishes, control of our passions, restriction of our indulgences, suppression of pride, of vanity and superciliousness, veneration for truth, uprightness and honesty in all our dealings, and benevolence and frankness in all our intercourse, may be mentioned as well ascertained duties which we owe to ourselves in our pursuit of that happiness which is the end and aim of our being, and the leading object of all our wishes.

But though in the ordinary transactions of life instead of following the glimmering taper of our own notions of moral rectitude it is better to obey the laws of the land, and the dictates of a conscience enlightened by the counsels of the wise, and the precepts of a pure religion, yet it does not cease to be important in preparing ourselves for the great and important duties of life, to pursue our inquiries into the principles of natural law, and their application in the direction of human actions. In discharging the momentous and responsible duties of lawgivers, which in this our free and happy country may devolve on many of you, a just and proper knowledge of the laws of nature, or in other words of the great principles of right and wrong, will throw a light upon your paths which may lead to wise and salutary legislation; and even in the sta-

tions of advocates or judges, the same knowledge will often elucidate the spirit of the law, and enable you to untie some gordian knot which, without its lights, would defy your most patient efforts. We shall therefore proceed with our investigations, and endeavor to ascertain what rules of moral rectitude are fairly to be deduced from the great principle we have established that the general good is to be our end and aim.

And here, it is first to be remarked that in inquiring into the tendencies of actions, we must never forget that they are two fold; *particular* and *general*. The *particular* consequences of an action are the good or evil which that action (considered singly,) directly and immediately occasions. The *general* consequences are the beneficial or mischievous tendencies of the action upon the happiness and well being of society, if such actions were generally permitted.

There is nothing in all morality more important than this distinction; and it is of peculiar importance in free countries like ours, where public opinion has so much influence, not only upon legislation and the system of jurisprudence, but also upon the administration of the laws, and the general conduct of society.—Of this it is painful to present one or two instances of the greatest enormity which have occurred in some of the states of the Union within a few years past, and it is scarcely less painful to observe that there are not a few whose virtuous but mistaken feelings lead them to justify or palliate them. Before I proceed to state them however I beg leave to avail myself of some of the illustrations of Mr. Paley preceded by his statement of the principle itself.

“The general consequence of any action,” says he, “may be estimated, by asking what would be the consequence, if the same sort of actions were generally permitted.—But suppose they were, and

a thousand such actions perpetrated under this permission, is it just to charge a single action with the collected guilt and mischief of the whole thousand? I answer, that the reason for prohibiting and punishing an action (and this reason may be called the *guilt* of the action, if you please) will always be in proportion to the whole mischief that would arise from the general impunity and toleration of actions of the same sort." "Whatever is expedient is right." But then it must be expedient upon the whole at the long run, in all its effects, collateral and remote, as well as in those which are immediate and direct; as it is obvious, that, in computing consequences it makes no difference in what way or at what distance they ensue. To impress this doctrine upon the minds of young readers, and to teach them to extend their views beyond the immediate mischief of a crime, I shall here subjoin a string of instances, in which the particular consequence is comparatively insignificant; and where the malignity of the crime, and the severity with which human laws pursue it, is almost entirely founded upon the general consequence.

The particular consequence of coining is, the loss of a guinea, or of half a guinea, to the person who receives the counterfeit money; the general consequence (by which I mean the consequence that would ensue, if the same practice were generally permitted) is to abolish the use of money.

The particular consequence of forgery is, a damage of twenty or thirty pounds to the man who accepts the forged bill; the general consequence is, the stoppage of paper currency.

The particular consequence of sheep-stealing, or horse-stealing is, a loss to the owner, to the amount of the value of the sheep or horse stolen; the general consequence is, that the land could not be occupied, nor the market supplied with this kind of stock.

The particular consequence of breaking into a house empty of inhabitants is, the loss of a pair of silver candlesticks, or a few spoons; the general consequence is, that nobody could leave their house empty.

“The particular consequence of an officer breaking his parole, is the loss of a prisoner, who was very possibly not worth keeping; the general consequence is that this mitigation of captivity would be refused to all others. Take the case of an assassin.—He knocks a rich villain on the head, because he thinks him better out of the way than in it. If you allow this excuse in the present instance, you must allow it to all, who act in the same manner, and from the same motive; that is, you must allow every man to kill every one he meets, whom he thinks noxious or useless; which, in the event, would be to commit, every man’s life and safety to the spleen, fury, and fanaticism of his neighbor—a disposition of affairs which would soon fill the world with misery and confusion; and ere long put an end to human society, if not to the human species.” How forcibly do these remarks apply to the shocking enormities perpetrated under the denomination of Lynch law and now becoming the opprobrium of the nation. They have hitherto, as is generally supposed, been dictated by a virtuous detestation of the unquestioned guilt of villains banded together for the vilest objects; and there is much reason to hope that the victims merited the severity of their punishment. But the danger is, that if such precedents are permitted they will be pleaded by malice and invoked by fanaticism, in justification of the most odious crimes. For you cannot permit one action and forbid another, without shewing a difference between them. Consequently, the same sort of actions must be generally permitted or generally forbidden. Where, therefore, the general permission of them would be pernicious, it becomes necessary to lay down and

support the rule which generally forbids them. From these principles, says Mr. Paley, a maxim may be explained, which is in every man's mouth, and in most men's without meaning, viz: not to do evil that good may come: that is, let us not violate a general rule for the sake of any particular good consequence we may expect: which is for the most part a salutary caution, the advantage seldom compensating for the violation of the rule. Strictly speaking, that cannot be "evil" from which "good comes;" but in this way, and with a view to the distinction between particular and general consequences, it may. Nor is it to be forgotten how great is the influence of example in human life. That influence would rapidly indeed extend the commission of offences, if it were generally seen that actions the most pernicious to society, but personally gainful to the culprit, are permitted to go unpunished. Thus if the robber were permitted to escape who has filled his pockets with gold, the necessitous might well be tempted to fill their pockets by a like means, instead of following the less gainful pursuits of honest industry. General rules are therefore not only necessary to every moral government; but it is equally necessary that they should be enforced with a due degree of strictness; for the certainty of punishment, much more than its severity, has ever been found to be efficient in the prevention of crime. And here it is proper to advert to the improper leniency of juries, whose misplaced mercies are calculated to lead to that greatest of all mischiefs, the licentious violence of mobs in the punishment of the guilty. Let the law be administered in its purity, let the guilty be brought to condign punishment by the judgment of their peers, let jurors learn that it is not within their province to *pardon*, but that they are bound by that oath, which binds them to the footstool of the Almighty, to try whether the culprit be guilty or not guilty, and to give a true verdict according to the

evidence, and public opinion would soon learn to bow to their decisions.—But when thoughtless juries indulging a criminal leniency will acquit the vilest felon contrary to the proofs, they strike at all confidence in jury trial; they tempt the people to look upon the clause of the constitution which secures it, as a mere protection for the villain, and they lead them to take the laws into their own hands and to avenge by violence the guilt that cannot be punished by law.

I will now beg leave in further illustration of these views to refer to the cases of recent occurrence in our own country, which have so justly shocked the moral sense of all reflecting and judicious men.

In one of the states of the Union a desperate gang of reckless and hardened villains were engaged in defiance of public authority in lawless gambling to the ruin of many unwary men and the general demoralization of all the youth of the surrounding country. The laws were not carried into execution against them by the constituted authorities. An association of individuals, headed by men of regular habits and good morals, but mistaken views, finding the arm of justice too slow to punish, determined to break up the haunts of these offenders and disperse them. Instead of resorting to the ordinary remedies of the law for their suppression, they went in a large body to the den of the lawless wretches, and attempted to enter it. They were met at the door by one of the desperadoes who fired upon them, and one of the most respectable of their party was slain. This melancholy catastrophe aroused their fury. They pressed on, and five of the gamblers, overpowered by numbers, were seized by the crowd—hurried straightway to a place of execution and there were hanged!!!

The occurrence excited a very general sentiment of horror throughout the Union; yet there were not wanting many well meaning but injudicious persons

who palliated or approved the act. Accordingly other instances (though of less enormity) of what is familiarly called "Lynch's law" have since occasionally occurred. They have usually terminated in severe corporal chastisement. Recently however two cases have been reported in the public prints, the recital of which is calculated to drive the life blood back upon the heart, and strike us with horror at the shocking effects of misguided feelings. In Kentucky 500 persons are said to have seized upon two notorious offenders, and instead of bringing them to justice to have resolved upon their execution. An intelligent lawyer addressed them in vain on the enormity of the act. They listened with the calmest attention but with unshaken purpose. They gave however to the trembling wretches the respite of a night, and sent a minister of the holy gospel to shrive them. The delay had no effect in bringing them to their senses. Under the despotic dominion of false principles, of mistaken love of virtue and hatred of vice, they hung their victims the ensuing day, without judge or jury!!! Like the fanatics who burned the heretic at the stake for the love of God, they committed the crime of murder, and believed that they were doing the state some service. They have stained its annals with a lasting blot.

The cause of error is downward, and in its fatal descent, it acquires the most fearful momentum. But a few weeks since a deed of horror yet more awful has been perpetrated on the Mississippi. From 27 to 50 persons alleged to be counterfeiters and forgers have been seized by a body of men under the pretext of protecting society from their villainies, and been drowned in its waters. Their hands were tied behind them, with all the coolness of fearful deliberation, and they were plunged thus trampled into a watery grave! The heart sickens at the recital, and the guilt of the victims is forgotten in the atrocities of these vindicators of the law!

It can scarcely be necessary to denounce such horrible transactions, to ingenuous youth whose hearts are not yet hardened by a commerce with the world and a familiarity with the awful scenes of lawless violence and bloodshed. It can scarcely be necessary to remark to them that nothing in all morality is more true, than that it is better for ten guilty persons to escape their merited punishment, than for one man whether innocent or guilty to suffer without trial and without law. The fellest murder is not so dire as the lawlessness of a mob which undertakes to punish it. They are themselves more guilty than the guilty object of their vengeance ! Moreover the *fact* of their combination demonstrates that there is no necessity for it ; for it is obvious that the same power which enabled the actors in these terrific tragedies, to commit a lawless murder, would have enabled them to bring the offenders to justice ; and their own numbers, and their own settled belief of the guilt of the offenders, far from leaving any reasonable doubt of their conviction, would rather inspire fears of the want of that impartiality in the judicial tribunals which is the soul of justice, and the deserved boast of our age and country. In vain do we pride ourselves upon the great principles of *magna charta*, in vain do we challenge for our protection the privilege of the *habeas corpus*, in vain do we look to the panoply of the constitution, and the protection of a jury of our peers, if mobs—whether with design to sustain or violate the law, can seize and execute the objects of their suspicion, without trial, without charge, without testimony—without the privilege of defence. The constitution of the United States provides that “ no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury except in cases arising in the land or naval forces or in the militia in time of war or public danger ; * * * nor be deprived of life, liberty or property

without due process of law," and in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury and be informed of the nature and cause of the accusation and be confronted with the witnesses against him and have compulsory process for obtaining witnesses in his favor and have the assistance of counsel for his defence. Amend. C. U. S. Art. 7, 8.

These provisions of the amendments of the U. S. are but the echoes of those noble clauses of magna charta and of other British statutes which were wrung from the crown many centuries ago, and have been transmitted to this people and engrafted into the statutes of all our states as the buckler of our liberties. I can perceive no means by which those can escape from their influence, who can view with any grains of allowance the disgraceful transactions which we have been detailing. They find no comparison in history, but in the horrors of religious fanaticism. In the eyes of the bigoted catholic, the huguenot was considered the enemy of heaven and was massacred as such: while the protestant himself, untaught by his own persecution, was not wholly guiltless of pouring out the blood of the erring papist for the love of God. You, I hope, young gentlemen, will go forth into the world braced against such fatal delusions. Resist with all the moral force of irreproachable lives, and with all the power of irresistible reason,—aye, and with all the energies of intrepid soldiers of the constitution, the deleterious principle, that the number or the notorious guilt of offenders will justify their punishment without trial, or palliate "the deep damnation of their taking off."

LECTURE III.

OF RIGHT.

I have endeavored in the preceding lectures to show, that there is a natural sense of right and wrong implanted in the heart and that the first duty is obedience to its dictates. But the word right is not to be understood solely as indicating the quality of actions. As an adjective indeed, it means fit, proper, just and honest; as a substantive it has of course a meaning analogous to them.

Right means *just claim*; that which properly belongs to one; property, interest, immunity, privilege. Thus, "I have a right to my estate," means that I have a just claim to it; it is my property; it properly belongs to me. So also it signifies immunity or privilege. It is my right, (that is my *immunity*) that my person shall be free from assault, and it is my right or *privilege* to defend myself against it. The first law of nature being the law of self preservation it is my *right*, that is my *privilege*, to use all the means in my power to effect this object without encroaching on the rights of others. So that the right which I have to do an action or to possess any thing, is in effect the power of doing the action or possessing the thing consistently with law.

In this sense of the word, "right," we come next to consider whether we have any, and if any, what natural rights. Now this has been already done in part in a former lecture, in which we have shewn that the right of self preservation is recognized by the whole human race as the first law of our exis-

tence. I have already shown too that the right of property, being as universal as the human race, it must be taken unquestionably to be a natural right. The right of property indeed, to some extent, however small, is inseparable from the sustentation and preservation of the species. Admit the apple upon the tree to be in common, yet when I have plucked it, it is mine, for my consumption. In it therefore I have property; and that is all that is required to be established in this stage of our progress. I shall hereafter have occasion to examine more at large the general principles which apply to the acquisition of property in a state of nature. It is enough for the present to bear in mind that all men have a natural right to protect and preserve themselves; to defend their persons and their liberty from attack and to enjoy that property which they have lawfully segregated from the common stock for their own support and comfort.

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Rights have been divided by the writers upon natural law into perfect and imperfect. "He would be but an indifferent casuist, who, in explaining the distinction between these two sorts of rights, should only tell us, that perfect rights are those, which may be asserted with rigor, even by employing force to attain the execution, or to secure the exercise of them, in opposition to all such as should attempt to resist or disturb us; but, when reason does not allow us to use forcible methods, in order to secure the enjoyment of the rights, which she grants us, then these rights are imperfect ones. If a man had any doubt concerning some particular right, whether it was perfect or imperfect; and was upon making enquiry of his casuist, to receive only this description of the two sorts of right; instead of being resolved as to his present doubt, he would only be led to another; he would be sure upon receiving this answer no doubt, whether the right was such an one, as might be supported with rigor, and by the use of force, or not; and his casuist would ne-

ver be able to give him any reasonable satisfaction in this point, till he has given a farther and clearer explanation of the distinction between the two sorts of right, than this before us.

“We may perhaps see the distinction between perfect and imperfect rights more clearly; if we observe, that where the things, which we have a right to possess, or the actions which we have a right to do, are or may be fixed and determinate, the right is a perfect one: but where the things or the actions are vague and indeterminate, the right is an imperfect one. If a man demands his property, which is withheld from him, the right, that supports his demand, is a perfect one; because the thing demanded is, or may be, fixed and determinate. But if a poor man asks relief of those from whom he has reason to expect it; the right, which supports his petition, is an imperfect one; because the relief, which he expects, is a vague and indeterminate thing. As far as the bargain between a master and his servant has determined the service, which the latter owes, and of course the command, which the former has a right to give, the master’s right to command is a perfect one. But though a parent has a right to expect esteem and reverence from a son, that is of full age; yet as the measures of esteem and reverence, which the son then owes to the parent, are not fixed and determinate, the right of the parent is, in this instance, an imperfect one.

“If this account of the matter does not appear satisfactory, we may consider it in another light. Where no law restrains a man from carrying his right into execution, the right is of the perfect sort. But where the law does in any respect restrain him from carrying it into execution, it is of the imperfect sort. Or, in other words, our right is a perfect one, where we can carry it into execution, without breaking in upon the right of other men; but it is an imperfect one, if the rights of other men stand in the

way of it; so that we cannot carry it into execution without breaking in upon them. Thus I have a perfect right to defend my life against those, who have no right to take it away. I have a perfect right to make use of such means as are necessary for my defence; where the law does not prescribe the means to be made use of. I have a perfect right to keep my property; since my possession of what is my own does not violate the rights of any other man. When my property is withheld, my right to recover it is a perfect one; because no law restrains me, or no person has any right to hinder me from recovering it. My poverty may give me a right to expect relief from them, that I have deserved well of; but I cannot carry this right into execution without breaking in upon the right, which they have to their own property; the law therefore restrains me from carrying it into execution, and the right is an imperfect one. If I am well qualified for any office of trust and profit in a civil society, especially if I am better qualified for such office, than my competitors, I have a right to expect it: but this right is only an imperfect one; because the office being in the disposal of the governors of the society, I cannot carry my right into execution without breaking in upon their right to dispose of it, as they please; and the same law, which gives them the disposal of it, hinders me from carrying my right into execution."

Such is the view which this distinguished writer on natural law has taken of perfect and imperfect rights. With great deference, I beg leave to say that he seems to me to have labored the matter not very satisfactorily since an attention to the very meaning of the word, *right*, presents at once the true distinction. Right, as we have seen is *just claim; property; immunity or privilege*; and he therefore who has right, has just claim, property, immunity or privilege according to the subject matter in question. Thus I have *just claim* to my pro-

erty, and have therefore a *perfect* and undeniable right to keep it or retake it, if deprived of it. For if my right is short of being *perfect*, there is something wanting to make it a *just claim*, which by the hypothesis it is admitted to be. To deny that it is *perfect* would be to deny the hypothesis itself. So as to my life. I have a perfect right to defend it against those who would take it away. Why? Because the right of self preservation is *my* natural privilege, and unless it is perfect, absolute and undeniable, unless it depends upon myself alone, and not upon another it is not *my* privilege, but *his*. Thus it appears to me clear enough what are perfect rights. Whatever I have a just claim to, I have a perfect right to: Whatever is my privilege, which I may exercise without dependence upon another's will, is a perfect right.

On the other hand where I have no *just claim* but my only *pretensions* rest upon the good will or the performance of a moral duty by another, I have not a perfect right. It is a case in which as Grotius expresses it *obligatio est in nobis et nullum jus in alio*. Gro. B. 2, ch. 11, § 3. In strictness indeed, I have no right at all; since the idea of *right*, *ex vi termini* implies something which is exclusive. The writers on natural law seem indeed to have agreed to look upon such *pretensions* as constituting what they call *imperfect* rights. They attribute to them the epithet of *right* because there is some *obligation of conscience* in some other to allow them; but they regard them as *imperfect*, because that other has the discretion to reject them. According to them these rights (such as they are) spring from obligation, instead of the obligation springing (as in case of perfect rights) from the right itself: binding only *in foro conscientie* and therefore imperfect, the right which corresponds to it is imperfect also. For right and obligation they say are correlative terms: "where any person has a right, some one or

more persons are under an obligation, which corresponds to that right: and on the contrary, where any person is under an obligation, some other person or persons have a right, which corresponds to that obligation. If the right is a perfect one, so is the correspondent obligation: if the right is an imperfect one, the obligation is so too.

“This might serve for the explaining the distinction of obligations into perfect and imperfect. As a man’s right to his life is a perfect one: we may be sure, if we know this, that the obligation not to take it from him is a perfect obligation. As the proprietor has a perfect right to demand his goods of us, when we happen to be in possession of them, we are under a perfect obligation not to withhold them. We are obliged to relieve the indigent; but our obligation is of the imperfect sort, because they have only an imperfect right to expect relief. When we have the disposal of places of trust or profit, we are obliged to give them to the most deserving: but this obligation, in respect of those, who are most deserving, is an imperfect one; because their right to the places, which they ask for, is of the imperfect sort.” *Ruth.* 45, 46.

Though I cannot altogether concur with the learned author in his views of rights and obligations, and agree rather with Grotius, that in these cases there is indeed an obligation on us, but one which conveys no right to another, yet as the difference is only verbal I shall content myself with following the course of the writers on natural law in the use of the terms perfect and imperfect as applying to rights and obligations.

Another division which has been made of rights is into natural and adventitious. Natural rights are such as would belong to a man although there subsisted no civil government whatever. Adventitious rights are such as would not. Natural rights are a right to his life, limbs, and liberty; to the produce of his own labor; to the common use of air, light

and water, and of the common fruits of the earth segregated by himself for his *necessary* use. If a thousand persons from different quarters were cast together upon a desert island they would from the first be every one entitled to these rights. Paley 75.

“But though some of our rights are thus called adventitious, and are by this means distinguished from natural rights; we must not imagine, that only the natural rights of mankind are under the protection of the law of nature; or that it is no offence against the law of nature to violate such adventitious rights. This law equally forbids the violation of our rights of either sort: such things, as we acquire consistently with the law of nature, are as much our own, as if nature had given us them originally: as much causeless harm, that is, as much injustice, is done to a man, by causelessly taking from him what he has fairly acquired a right to, as by causelessly taking from him what he had a right to by nature. And since the law of nature equally forbids every instance of injustice, it forbids, not only the violation of men’s natural rights, but of their adventitious ones too.”

Rights are also alienable or unalienable. Thus the right to property is alienable whether it consist of houses, lands, money or other thing, provided the right to it is absolute. But the right of a husband over his wife or a master over his servant (not his slave) are generally and naturally unalienable; for they partake of the character of a contract; a personal contract by which the wife or the servant incur an obligation to fulfil the duties of their respective characters to *me*—not to *another*; and of course I can have no right to require them to fulfil them to another. But where a man’s right to property is absolute, he may part with it, if he pleases, by giving it up entirely or transferring it to some other person. An absolute right is otherwise unintelligible; since the *power of doing as we please*

with our property makes up the whole nature of such a right. And thus it is that by the municipal law the power of alienation of one who has an absolute estate cannot be restricted; for the restriction is held and taken to be in derogation of the grant.

This however by no means settles the question whether the right to civil liberty is alienable, which Mr. Paley affirms; though he says, "that in the vehemence of men's zeal for it, it has often been pronounced an unalienable right." For the question still recurs whether it *is* lawful for any individual to sell his civil liberty; and without entering into a disquisition in detail to prove that it is not, I cannot, I think, in this enlightened age and free country, go wrong in affirming, that it is not lawful for man to make himself a slave; to alienate his power of moral action by subjecting his own conduct to the arbitrary will of another; to give up the right and duty of self preservation into other hands; and to place beyond recall (for such is the effect of alienation) the most important privilege of his nature the free and uninterrupted pursuit, according to his own best judgment, of his liberty and happiness.

If it should be said that he does this upon entering into society, it may be answered that it is *natural* liberty which man surrenders when he enters into society as the price of that civil liberty which is secured to him by it; and that it by no means follows that because we exchange our natural liberty for civil liberty, we can afterwards lawfully part with the latter and make ourselves slaves to those who by the principles of society are but our equals.

Before I pass from these topics we shall find much advantage I think in adverting to some of the connections between the principles we have been examining and the municipal law.

And first as to perfect and imperfect rights. We have seen that there may be instances in natural law

of a strong moral obligation on one person to do an act beneficial to another, while no perfect right exists in the latter to demand its performance. Thus a parent has a right to expect esteem and reverence from his child, and when the days have come when he can find no pleasure in them, and when he shall be stricken down by the hand of misfortune, he has surely a right to look to that child as the staff of his declining years, and to call upon him, whom he cherished and nurtured in the weakness of infancy, to repay his cares by upholding the tottering imbecility of age. In such a case it would seem natural and right that the stream and current of benefits should be turned back upon its source. Yet the writers upon the laws of nature all concur that this is but an imperfect right in the suffering parent ; or in the language of Grotius it is one of those cases in which there is an obligation indeed upon one of the parties while there is no corresponding right existing in the other. And so says municipal law, at least the municipal law of this our land. It is very much to be wished that it had said otherwise, and made legal that obligation which binds the son to honor and protect the venerable author of his being. But there is no such principle in our jurisprudence.

Nor is this the only instance in which municipal law is deaf to the assertion of what are called imperfect rights. In many instances indeed its policy has multiplied them. Thus money lent to an infant cannot be recovered back by the lender. The obligation on his conscience to repay is the only hope of the lender. The loan creates no legal right which can be enforced by an appeal to the tribunals of law. So too of money lent to play with, or of a debt barred by the statute of limitations, or discharged by a certificate of bankruptcy. In all these cases who can doubt the moral obligation to discharge the debt ? And yet the law affords no remedy. The obligation is upon the *conscience* only, and the creditor finds his just de-

mands reduced by operation of law to the character of imperfect rights.

In these cases however, and wherever there is a moral obligation upon the conscience, although of itself it is deemed imperfect, yet it will serve as the foundation on which a subsequent promise may firmly rest. For where a man is under a moral obligation and promises to fulfil it, the honesty and rectitude of the thing will be sufficient to make the promise binding, although without it no court of law or equity could have compelled performance. Thus the promise gives a compulsory remedy where there was none before, for as he was bound before *in foro conscientiae*, that forms a sufficient consideration for binding him by his promise in the *forum* of the country. Cow. Rep. 290. 1 Tuck. Com. 355 in note citing Christian's note.

It may moreover not be amiss here to observe that while on the one hand a mere moral obligation, not followed up by a promise, will not support an action, so on the other the most solemn promise (provided it be not by deed or negotiable paper) will be equally inefficient, unless it is sustained by a valuable or meritorious consideration. Every promise made without consideration is *nudum pactum*. "A consideration of some sort or other" says Mr. Blackstone, "is so absolutely necessary to the forming of a contract, that a *nudum pactum*, or agreement to do or pay any thing on one side without any compensation on the other is totally void in law." "For however a man may or may not be bound to perform it in honor or conscience, which the municipal laws do not take upon them to decide; certainly those municipal laws will not compel the execution of what he had no visible inducement to engage for: and therefore our law has adopted the maxim of the civil law, that *ex nudo pacto, non oritur actio*." But any degree of reciprocity will prevent the pact from being void; nay, even if

the thing be founded on a prior moral obligation (as a promise to pay a just debt though barred by the statute of limitations) it is no longer *nudum pactum*, but is held and taken to be valid and binding in law.

Next as to our natural rights, we find the authors of municipal law travelling in the footsteps of the law of nature. They recognize, as inherent in every individual, those original and absolute rights which in contemplating the nature of man, we discover to arise out of that very nature and constitution. The right of personal security, the right of personal liberty and the right of acquiring property are the principal objects of the protection of the law. The invasion of them is visited with the punishment appropriate to the character of the injury. Murder, homicides of less atrocity, mayhem duress, imprisonment, assaults, batteries, and even threats and menaces, all come under the animadversions of the law. And what is more, it looks with paternal care not only to the punishment but to the prevention of injury. And hence comes the habeas corpus, justly considered the great bulwark of personal liberty; and hence the provisions for the security of the peace, by which the hands of the ruffian are tied up, and the peaceful are protected from the violence of the disturbers of the public quiet.

OF PROPERTY.

“The earth and the fulness thereof” has been given to man for his enjoyment; and as all mankind stand in the same relation to the giver of all good, this beneficence of his must be regarded as having been designed for all; since it is impossible to discover any indication in his works that it was intended originally for any particular part of the species, or for any race or individual exclusive of the rest. Independent then of that division and distribution

of property which so universally prevails through the institutions of society, let us conceive for a moment an original state of things when all things were in common. In this condition of affairs, all men had collectively a right to all the fruits and vegetable products of the earth and to all those animals whose flesh would serve for their nourishment and support. For though some squeamish cavillers have expended much mawkish sympathy, for the sufferings inflicted on the brute creation, by using them for food, while others are driven to resort to divine command to justify the practice, I think it will be enough for us to advert as we have heretofore done, to our nature and constitution, as sufficiently evincing the design of our being in reference to the matter in question. Now it has been satisfactorily shewn by the naturalist from our organization and structure, as it is abundantly proved also by our inclinations and appetites that man was designed to be a carnivorous animal ; and so indeed we find him throughout all ages and countries of the world, with a few exceptions, attributable, not to the dictates of nature, but to the unnatural institutions of society.

In the view which is here presented of the original community of goods it would seem to be obvious that they could have been used and enjoyed by us only as we had occasion for them. Each person might have taken out of the joint stock as much as he wanted but no more ; since the act of taking more would in itself be a segregation from the common mass in derogation of the community of goods and of the rights of others who might have occasion for them. It would amount, as far as it went, to a partition of the common property and to making that exclusive, which of right had before been held in common.

The community of goods could not even in its original have been otherwise than the fruitful source

of controversy even among savages; and as mankind increased in numbers, it must obviously have become inconvenient and impracticable. Their wants would increase with their association, and hence it would doubtless soon become necessary to fall upon some methods of increasing their resources, and of giving certainty to their supplies. The most effectual mode of doing this would be the introduction of exclusive property. The share of each being set apart and ascertained, no one would have a right to complain of what others were enjoying, nor could any have a right to hinder others from using and enjoying what they would have a right to use and enjoy exclusive of themselves.

One of the inevitable consequences however of this introduction of exclusive property, would be a speedy increase of the inequality of conditions. While all things were in common, no one had a motive sufficiently strong for laboring to increase the common stock. Any doubt of its adequacy for the support of all would be the parent rather of rapacity than of industry. Few would be found willing to give the sweat of their brow for the benefit of all. But no sooner would property become exclusive, than man would begin to increase by his labors the sources of his comforts and the hoard of his possessions. By and by his desires become multiplied, and the natural disposition for comfort is expanded into an eagerness for fancied conveniences, and at length for the luxuries and elegancies of life. These are the great stimulants to acquisition. But they animate different individuals in very different degrees. While some are eager in the acquisition of wealth, others are more content with the negative enjoyment of lassitude and indolence. While the world lasts there will be always drones in the great hive of society, and the ant will continue to be the just prototype of the pains-taking and industrious. But this is not all. *Talent* as well as *temperament* has

its influence upon accumulation ; and the powers of the mind, and the vigor of the frame, and the character of the habits are all apt to display themselves in nothing more, than in their influence in the acquisition of independence and affluence. And thus we have an easy explanation of the origin of that phenomenon which Mr. Paley has so ingenuously illustrated.

“ If,” says he, “ you should see a flock of pigeons in a field of corn ; and if (instead of each picking where, and what it liked, taking just as much as it wanted, and no more) you should see ninety-nine of them gathering all they got into a heap ; reserving nothing to themselves, but the chaff and refuse ; keeping this heap for one, and that the weakest perhaps and worst pigeon of the flock ; sitting round, and looking on all the winter, whilst this one was devouring, throwing about and wasting it ; and, if a pigeon more hardy or hungry than the rest, touched a grain of the hoard, all the others instantly flying upon it, and tearing it to pieces : if you should see this, you would see nothing more, than what is every day practised and established among men. Among men you see the ninety and nine, toiling and scraping together a heap of superfluities for one ; getting nothing for themselves all the while, but a little of the coarsest of the provision, which their own labor produces ; and this one too, oftentimes the feeblest and worst of the whole set, a child, a woman, a madman or a fool ; looking quietly on, while they see the fruits of all their labor spent or spoiled ; and if one of them take or touch a particle of it, the others join against him, and hang him for the theft.”

The picture it is true may be considered as overwrought, and it certainly is taken from a very advanced and perhaps a very corrupt state of society. Yet there is too much truth in its outline, and it would not be difficult to shew that the natural tendency of accumulation, which is consequent upon

the introduction of exclusive property, is to lead in an advanced state of wealth and refinement to a state of things approximating at least to this creation of Mr. Paley's imagination. It does not follow however that it is an unmixed evil. The author already cited, observes that "inequality of property in the degree in which it exists in most countries in Europe, abstractedly considered, is an evil: but it is an evil, which flows from those rules concerning the acquisition and disposal of property, by which men are incited to industry, and by which the object of their industry is rendered secure and valuable; and there is little reason to doubt that with all its mischiefs it has tended and ever will tend very greatly to increase the comforts of the *mass* of mankind." It is indeed highly probable that with very few exceptions "even the poorest and worst provided in countries where exclusive property and its consequences prevail, are in a better situation with respect to food, raiment, and other necessities of life, than *any* would be if all things were in common. The scale preponderates therefore on the side of the institution of property, with obvious and decided advantage."

But though there seems to be among writers on natural law a common consent that the introduction of exclusive property was demanded by the necessities and the comfort and convenience of mankind, yet they have been by no means agreed—(as indeed may well be the case, since the whole affair is but a matter of speculation)—as to the manner of its introduction, and how it could be effected consistently with natural justice. The learned Grotius was of opinion that occupancy was the foundation of private property; a tacit consent being implied on the part of all others to this segregation of part of the original common stock by the new appropriator. Mr. Locke agrees with Grotius that occupancy is the true ground on which the right of separate pro-

erty depends, but not upon the supposition of a tacit consent on the part of the joint owners. He supposes the appropriator to intermingle his own labor or his own acts with the subject, and thus to make it his, by uniting with it what unquestionably is his own. Mr. Rutherford very earnestly and successfully controverts his theory, and insists that some consent was necessary to the introduction of exclusive property consistently with justice, although a tacit consent would suffice, and this tacit consent is implied from occupancy without objection.

For my own part, if I could conceive of such a state of things among mankind as these writers seem to have supposed, I should be inclined to think the idea of separate property would spring up habitually in the minds of men, from their habitual acts of appropriation. Every man it is conceded would have a right to take from the common stock, that which his necessities demanded. *When* taken he would look upon it as his own, and in like manner he would begin to look upon what others took as theirs. Here then at once is separate property; and the gradual advances which would be made to the recognition of exclusive right in other things than absolute necessities, may easily be perceived by those who duly estimate the powers of association of the human mind, and the faculty which belongs to our species of pushing forward an idea however simple, to its remotest consequences. But in truth I look upon these speculations as having little probability in fact, and not much value in point of utility. That man ever existed in what is familiarly called a state of nature is but the dream, I think, of the visionary theorist. If we look to the scriptural history we find the first germ of society in two beings ushered into life, mature and perfect, bound together by sexual ties, and soon forming the first society in a family of sons and daughters. One of these together with his family and descendants uni-

ted in building a city for their defence. Thus associated the natural effect was to multiply their wants and their refinements; to sharpen the intellect and to point to that most obvious means of improving their condition, the recognition of a separate property, if that indeed had not been done, anterior to the tragedy of Abel's death. The selfish principle, so peculiarly strong in the human bosom when not mitigated and controled by social affections, in nothing manifests itself so early or so strongly as in the desire of exclusive property. I should rather take it to have been coeval with our race, and to have sprung into existence with the first idea of distinct and separate interests. If so there can be little doubt that according to scriptural history the ground was tilled by Cain for himself and family, while the flocks and herds of Abel furnished *his* support: and the idea of property thus possessed by them would be transmitted naturally to all their race.

If however we can venture to doubt the accuracy of this account of the origin of man still the result must be the same. The first created pair must have been mature, wherever it may have been that they were placed upon the earth; and then the natural course of things would follow, which has but now been pointed out in reference to Adam and his race.

Waiving therefore any further enquiry into these speculative matters and referring the student who is desirous of pursuing it to the writers already cited and to Mr. Paley's and Mr. Blackstone's works, I shall pass on to some other considerations respecting the law of property which admit of more distinct and accurate ascertainment.

And here let it first be observed that property, in the strict notion of it, is such a right to a thing as excludes all persons except the proprietor from all manner of claim upon it. The word has *ex vi termini* this signification. It may be derived from *proprius*, which signifies my own, and that which is

my own, in no sense can be another's. But though no other has a right to it, or can hinder me in the enjoyment, yet may I invest him with a right at my pleasure. For one of the most essential principles of the right of property is the right of disposition. If then I have property in the thing, I have power of alienation; and here is the germ of the transfer of property, whether real or personal.

But again, if, having the absolute property I have the power of disposition of the whole subject, and forever, I have, upon the principle, that *omne majus in se continet minus*, a right to dispose of it in part, or for a limited time. For, *cujus est dare ejus est disponere*, and I may well attach to my gift or transfer, any condition which is not inconsistent with the grant itself. I cannot give or transfer the absolute right with a provision that the transferee shall have no power of alienation, for that provision would be inconsistent with the grant and therefore void. But I may grant my land or my property for a limited time and during that time the grantee has power to use them, but when it expires they revert to me in absolute right again. And here we see the germ of limited estates, of remainders and reversionary interests and of all those limitations which become so important in the alienation of real property and in the preparation of conveyances.

Pursuing the principle however just announced, that no condition or qualification of a gift or transfer which is utterly inconsistent with it can be valid, we discover another principle restricting the power of limitation. For though a man may well grant the use of a thing for a limited time when the thing itself can be returned, yet it is otherwise where the only use of the thing consists in the consumption. Thus lands, houses, slaves, horses, books, &c. may be loaned, given or transferred for a limited time and when that time expires they may be returned. But wine, grain, provisions and such like, though

they may be *loaned* to be returned in kind, yet a *gift for life* of such things is a gift of the absolute property, and there can neither be a limitation over after a less interest in such articles, nor can there be a reversion left in the donor. This exception forms an interesting head of municipal law, and will be the subject of further investigation and more accurate exposition in the course of lectures on that subject.

The right of alienation which we have already seen, is an incident of the right of property and carries with it the right of partial disposition, may be exercised moreover not only by its being given, granted or transferred, but also by its being charged or encumbered. Thus if I owe a debt I may charge or encumber my land or my personal estate for its payment, by agreeing on failure of payment, to the sale or disposition of the property for its satisfaction. And out of this principle which writers lay down as a principle of natural law, grows the law of mortgages and pawns, the former of which are a security given upon real property for the payment of a debt, while the latter are pledges of moveable or personal property, which are assigned over to the creditor as a security, that upon failure of payment he shall have the property or the thing pledged, in absolute right.

Nor is it by these means or for these purposes only that the right of property may be modified, limited or incumbered. For convenience may lead to other arrangements by which third persons may have a partial enjoyment of that which belongs to me. Thus either by my own contract or by the very conditions on which I myself may have received my estate, another may have a right of way, or a right of pasture, or of fishing, or of taking wood or turf, or a right to a certain rent issuing out of the land. These and a vast number of services as they are sometimes called, may constitute burdens upon my

and thus limiting and modifying my right of property and conferring on another, not indeed any part of the land itself, but a sort of incorporeal interest issuing out of and collateral to it. And this is the foundation of those interests or estates some of which in the municipal law are denominated incorporeal hereditaments, while others are known under the appellation of easements. See Rutherford, p. 86.

LECTURE IV.

Let us now look into the law of property in another view. The world being divided into separate *societies* even from the earliest time, these societies would very naturally make their selections of the lands and countries which they desired to appropriate. The comparative thinness of the inhabitants of the earth would remove all difficulty or cause of difference in the exercise of this right. "The world was all before them where to choose," and nothing was more natural than that they should act upon the principle proposed by Abraham to Lot, "do thou take unto the right, and I will take unto the left, so that there may be no strife between thee and me." Hence there seems to be some propriety in the division of property which Mr. Rutherford has made into general and particular.

"By general property is here meant the right, which a body of men have to a thing, exclusive of the rest of mankind: and by particular property is meant the same exclusive right in an individual. General property is acquired by a general occupancy, or by occupancy in the gross. A number of

men, uniting themselves into a collective body, are seeking for a place to settle in, and finding a large tract of land uninhabited, they seize upon it, and settle there. By such an act of occupancy the whole country becomes the property of this body of men. Though no single person in the body has a right to exclude any other single person, in the same body, from the use of any spot within the whole tract of land so seized upon; yet all and each have an exclusive right to the whole, and to every part of it, in respect of all other individuals who are not members of this body, and in respect likewise of all other collective bodies whatsoever.

“After such a general property has been introduced in the whole tract of land, where this body of men has settled; something farther is requisite to give the individuals, of which the body is composed, particular property in the several parts of this tract. This particular property is introduced either by express division and assignment, or else by particular occupancy; that is, either the body by express agreement divides the whole country into parcels, and assigns to each individual the parcel, which is to be, and which is thus made, his own; or else the body allows the individuals to seize upon such spots or parcels of land, as they like best, and gives them, or rather allows them to have, an exclusive right to these spots or parcels so seized upon.

“Property in goods may cease in two ways. It ceases, when the owners relinquish their right without transferring it to any one: and it ceases likewise, when the owners are extinct, that is, when no person is left, who has any right to the goods. Property in goods ceases by the owners dereliction of them; because, as no one else had any exclusive right in them, upon his dereliction or quitting his claim, no one at all has any exclusive right in them; and consequently they become common to all alike. Property in goods ceases, when the owners of them

are extinct ; because property and a proprietor are relative terms, so that one of them cannot subsist without the other : property is the exclusive right, which a person has to such goods, as are upon account of this exclusive right, called his own, or his property ; if therefore the persons, who had such right, cease to exist, the goods are no longer the property of any one.

“It is possible however, that goods, which are relinquished by their owners, or goods which cease to have any particular owner, may not so far, become common, as that any person, who pleases, is at liberty to seize upon them, and by such occupancy to gain property in them. Where a body of men have seized upon a tract of land in the gross, and have by such occupancy acquired a general property in it ; if the individuals, of which this body is composed, acquire private or particular property afterwards in the several parts of this land, either by an express division and assignment made by the collective body, or by particular occupancy with the allowance and consent of such body ; then upon the dereliction or failure of these particular owners, the land returns into the state, in which it was before those individuals had acquired particular property in it ; that is, it again becomes the general property of the collective body. No person therefore is at liberty to seize upon such parcels of land, as have thus ceased to be in private property : because though they have no particular owners, they have still a general owner ; the collective body has the same exclusive right to them, that it had before any of the individuals acquired private property in them.

“This principle does not naturally extend to moveable goods. Though the land, and such immoveable goods as adhere to it or may be considered as parts of it, were originally seized upon by the collective body, and are therefore matter of general property ; yet each individual may well be supposed

to have acquired property in many sorts of goods, before he settled with the collective body upon that particular tract of land. What plate or jewels, what money or clothes he brought with him, are his own ; they are not parts of the land, and can scarce be supposed to have been acquired with it. If he had caught and tamed cattle for his use ; his right to his sheep, or horses, or oxen, which he had so caught and tamed, is not derived from the collective body ; these goods were his own, not only before he settled with such body, but perhaps even before he joined himself to it. When therefore such goods as these are relinquished by their owners, or when the owners of them fail ; if the collective body, of which they were members, has any general claim to the goods ; that is, if these goods become the property of such collective body, so as not to be free for any person, that pleases, to seize upon them, and make them his own ; this effect must be produced either by the consent of the several owners, or else it must arise accidentally from the claim, which the body has to the land. All foreigners, that is, all who are not members of this body, are excluded from seizing upon such moveable goods, as have no owner, and are found upon that land, in which the body has general property : because they have no right to come upon the land for this or for any other purpose of their own, without leave. So again, when any parcel of land is returned to the public, upon the failure or dereliction of the private or particular owners ; such moveable goods, as have likewise no owner, and are found upon that parcel of land, will become the property of the public : because, as they have property in the land, no individuals, even though they are members of the public, can claim to come upon it in order to seize upon those goods, and by such occupancy to make them their own. But where moveable goods having no owner are found upon land, which has an

owner, if the owner of the land, being likewise a member of the collective body, may not seize them, so as to make them his property by occupancy, he must be precluded by some express law of that body. If this law is considered merely as a positive one, the justice of it is to be defended upon the principle already mentioned of its being established by the consent or agreement of the several individuals: or it may be considered as declarative, that the public grants out its general property in the land to individuals with this reserve, that whatever moveable goods having no owner are found upon it, they shall be seized for the use of the public, and not of the individuals."

In this not very lucid view by Mr. R. of the subject of public and private property considered in reference to the principles of natural law, the student of municipal law will see figured out nevertheless many of the most important portions and principles of the general law of the land. Here he perceives the reason and foundation of those principles. Here he sees how the public domain extends over the whole territory of the society or nation, and the consequent necessity of *public grants* to individuals in order to vest in them the particular title to a given portion of the lands. Here too he sees the foundations of the laws of escheat in relation to real estates by the dereliction of them by the possessor, and of the doctrines of occupancy in relation to moveable goods which have no longer an owner; though in relation to these latter he may be inclined to question some of the positions of the learned author, as not squaring exactly with the generally received principles of the common law, or of its great prototype the natural law of justice and of right. For Mr. Blackstone tells us that where goods are found without any other owner, they for the most part belong to the king by virtue of his prerogative or to the first occupant or fortunate finder; they are

considered "as abandoned by the last proprietor, and belong as in a state of nature to the first occupant, unless they fall within the description of waifs, or estrays, or wrecks; or hidden treasure, or the goods of an intestate dying without kindred." See 1 Tuck. Com. part 2, 322-3. We have also a particular law as to wrecks; all of which are vested by law in the king and form a part of the ordinary revenue of the crown. 1 Tuck. Com. part 2, 316.

OF THINGS WHICH ARE STILL IN COMMON.

Notwithstanding the introduction among mankind of the exclusive right of property of which we have spoken in a former lecture, it is obvious upon the most superficial observation, that there is much in the great world around us, which is not susceptible of being enjoyed except in common. Among these the first and most striking is the ocean and all that is therein. No argument is necessary to prove that it is not a subject of separate dominion. Its vastness is beyond our grasp, and defies the notion of that occupancy or appropriation, which lies at the foundation of exclusive property. Its immensity too and the exhaustless character of all that it contains, leaves no motive for an attempt to appropriate it (if it were possible,) in exclusion of others. In the great deep there is enough for all, whether we use it but as a highway or pursue upon its bosom the gainful business of the fisheries. It is moreover incapable of segregation, and for that reason principally has never been looked upon as property. But though by the general consent and agreement of nations the *open* sea is held in common, yet in the history of the world there are frequent instances of a claim by particular nations to the seas within the limits of their empire, or surrounding their coasts, and even to a portion of the trackless ocean for a certain distance from its shores. Thus

Rome in the zenith of her power assumed dominion over the Mediterranean, which was absolutely enclosed within her territories. Venice in her palmy state asserted and maintained her supremacy over the Adriatic, which it is probable she still retains by sufferance, even in her present state of superannuated imbecility. England assumes the empire of the seas which wash and surround her coast even as far as the opposite shores; a claim which her triumphant fleets maintain, though other nations do not universally recognize it; while every people bordering on the ocean are entitled to dominion over it to such extent as their safety renders necessary; an extent which by the laws of nations is usually fixed at a marine league, though others have extended it to many more. Over this the nation has a property; and still more over rivers, bays and straits, and lakes and arms of the sea, bounded by shores and promontories that afford determinate marks and limits to separate them from the great deep.

But it is not the ocean only which is common to mankind. Many other things admit not of property till they are reduced to possession. Such are wild beasts and birds and fish, all of which are common till they are caught; and this not only by the law of nature but by the well established principles of municipal law. 1 Tuck. Com. 317; for though no man may fish or hunt upon another's land, the owner of the soil himself has no fixed title to the game until it has been taken.

There is yet another and important limit to the right of property. It springs from sheer necessity. To this head we may refer the right in case of fire to pull down our neighbor's house in order to prevent the spread of the destructive element and thus to save our own; or the obligation on shipboard which each person is under in a scarcity of provisions, to bring out his own stock and place it in common; or the right which in a storm, all who are on

board have to demand that each shall throw overboard a portion of his goods to lighten the ship; and lastly a nation's right to seize a neutral port of which there is a moral certainty its enemy will take possession to its serious detriment. Nay even farther will extreme necessity justify an inroad on another's rights. The "*tabula in naufragio*," is a proof of this. Two shipwrecked wretches on a single plank find it inadequate to save them both. Either has a right to save himself from death by thrusting off the other into a watery grave, and such is the recognized principle of the criminal law. 1 East Pleas of the Crown, 294, 1 Chitty's Gen. Prac. 597.

With respect to the throwing overboard at sea in the raging of a tempest, the goods of the passengers in order to lighten the ship, the municipal law differs not from the principles of natural law applying to the subject. But in the adjustment of the loss between them it follows the great principle of justice—which is equality—placing the loss upon all the property which has been saved in just proportion. This gives rise to the law of average or contribution which is of daily application in maritime and commercial operations. 1 Story's Eq. 467. 1 Cox, 318, 323.

The case of fire was adjudicated as long ago as the days of the great father of the law, Sir Edward Coke, in whose reports a case of that description is found. 1 Chitty's Gen. Prac. 610. Restitution however is due, says Mr. Paley, when that is in our power. Yet what is to be restored? Not the full value of the property when not in danger but what it was worth at the time of destroying it; which considering the moral certainty of destruction by the devouring element, if it had not been pulled down, most probably would be nothing. A case of this kind was recently before the court at Lewisburg.

As to the right of what has been called harmless

profit and which has been discussed between Grotius and Rutherford, it is utterly inconsistent with the notion of exclusive property, and amounts at most to what is called an imperfect right, which as I have already intimated is in effect no right at all, since it depends upon the discretion and will of another. Right, being *justa causa possidendi id quod nostrum est*, it does not enter into the notion of it, that it *can* depend upon that discretion or will.

OF ALIENATION.

It has already been observed in a former lecture that one of the most essential principles of the right of absolute property is the power of disposition. If then I have such absolute property I may alienate it; and so perfectly indeed is this principle established in municipal law, that a condition contained in a conveyance of a fee simple estate, restraining the alienee from disposing of it, is void, and of no effect in law. 1 Tuck. Com. part 2, 94.

But this power of alienation of necessity implies the existence of an alienor and an alienee, and the will of the first to convey and of the second to accept a conveyance. For I can no more, in justice, compel another to take my land than he can compel me to give it to him. And hence there must always be in every transfer a union of the wills of both parties to the transaction. For every transfer is of the nature of a contract, and in every contract there must be as the lawyers say, *actus contra actum*. And these must concur *uno tempore*. For if you do not accept my grant, I may retract it: and when I have retracted you cannot retract your refusal and accept. These are obvious principles of common sense and justice, and they are not less principles of common law.

It may indeed so happen that the acceptance precedes the grant; as if I ask for any thing, my

willingness to accept it is at once declared ; and if it be granted then, there is at once that contemporaneous concurrence of wills essential to every contract, gift, grant or sale.

As the concurrence then of the wills of both parties is essential to alienation, the evidence of that concurrence becomes important to establish the transaction. This by the law of nature need not be by deed or writing. The acts of the respective parties may be otherwise established. And so in cases of no great importance by the municipal law. Delivery and acceptance of moveable goods which are called personal property in law is ordinarily sufficient evidence of transfer. But to the alienation of lands more solemn forms are necessary, and deeds sealed by the parties are essential to give title.

Another step towards the extension of the right of property to meet the necessities and to fulfil the very natural desires of its possessor is the conferring on it an inheritable quality. The learned author (Ruth.) so often quoted, has expended much labor and devoted a dozen pages to explaining in what manner this quality was probably in the first instance introduced in regard to property. It would lead me too far to go into an examination of his theory. Suffice it to say that it is even less satisfactory than the notion of Mr. Blackstone, that "a man's children or nearest relations are usually about him on his death bed and are the earliest witnesses of his decease. They become therefore generally" says he, "the next immediate occupants, till at length in process of time this frequent usage ripened into general law." 2 B. C. 11. The children, then, who happened not to be present would lose their rights ; and this forms a serious objection to the theory, to say nothing of the unnatural scramble for the chattels of the dying parent by his weeping children, which seems to be an essential part of the learned commentator's projet for securing to themselves his property.

For my own part, after once supposing a notion of property to exist among men in a state however rude, all difficulty seems to me to vanish. Take the poor Indian with his dog and gun, his wigwam and his corn patch. His progress in the matter of property has reached thus far at least, that he knows his gun, his dog and hovel is his own. He knows that his brother Indian recognizes the right; for he too is chary of the principle of property in relation to his own little possessions. He looks around and sees his squaw and his papposes while the hand of death is upon him. Their wants occupy his last thoughts though he is but a savage, and their welfare is the last wish of his heart. Remember, that though but an Indian, he has the natural storgee at least as strong as any brute, and a mind that can look ahead into the future. Is it wonderful that the idea should present itself to him, to those around him, and to the friend on whom he throws the charge of those he leaves behind, that that which had been his throughout his life without dispute or question, should, when he was taken by the great spirit to himself, belong to these who were part of him, who if he had lived would have shared it and who most probably had united with him in its acquisition? Is it probable that such a pretension would be resisted by another Indian? Or is it not, on the other hand, most obvious, that the thought would find a ready assent in his own heart as presenting for the first time perhaps to his untutored mind the notion of transmitting to his children whatever he might leave? I cannot doubt it. When once the law of property which as Mr. Christian well observes is written on the heart of man, is recognized by civilized or savage, the natural tendency of the mind and feeling is to push it forward to embrace new cases as they may arise. 2 B. C. 8, note. Thus, the natural enquiry when property is acquired for mere consumption is first—Can I not secure more to myself than my im-

mediate wants demand ; can I not make provision for the future ; and if I do so shall I not find it my interest to acquiesce when others do the like ? Next comes the question—if I have my property for life why should I not transmit it to my children. They have the best right to the produce of my care and labor, for they are part of me—bone of my bone and flesh of my flesh. I will assert the right for them and respect a like pretension in others. And thus at once transmission to children is established. This at first most probably would be by death-bed gift, called in the law *donatio causa mortis*. Nothing could be more natural.

The right of giving and transferring, we have seen, is one of the most natural consequences of the existence of exclusive property, whatever be the principle upon which the right of separate property is founded. What was useless to one man might be highly convenient and useful to another, who might be ready to give in exchange for it some equivalent which was equally desirable to the first, and thus transfer by sale, grant and conveyance would soon become familiar. How simple then the transition to a death-bed gift ; the dying man calling the objects of his affection around him and dividing his little acquisitions among them ! And if this was omitted ; if swift disease or his savage foe should take him off too suddenly for this, how naturally would men fall into the notion, that the property should be divided as he would have distributed it if he had not been prevented. Even in the rudest state of savage life all would feel an interest in sustaining a principle which sooner or later they would desire for the protection of their own descendants. If this be so, then the principle of transmission by inheritance to children is accounted for ; and when that is done, the succeeding steps are natural and easy to a general system of inheritances.

We come next to consider the power of disposing

of property by will. "From the power," says Mr. Rutherford, "which a man has of alienating his property in what manner and upon what condition he pleases, it follows that he may naturally prevent his property from ceasing upon his death by making a will and disposing of it in his lifetime."

In this opinion I concur, though I am by no means satisfied with his explanations of his theory or by the ingenious and subtle reasoning introduced to support it. None such is demanded by the occasion; for if we once suppose the death-bed gift in common use, nothing could be more simple than the introduction of a testamentary gift. The Indian who had children is, by the customs of savage life, permitted *on his death-bed* to give away his property among them. And if upon his death-bed why not upon his going to battle? And if upon going to battle why not at any other time, to guard against contingencies which even savages can anticipate? And if the privilege of continuing property after death be allowed to him who has children, why should it be denied to him who is without them? He has his affections; he has his predilections, and he has moreover that tenacity of property so natural to the heart, and which prompts the anxious wish to direct its transmission when we are gone to those we value most.

In this way I think the testamentary power over property is easily accounted for. It may indeed be otherwise explained. In the exercise of the unquestioned power of alienation, I may give it to a friend upon condition; that I shall have the use during life and that the object of my bounty shall have it afterwards. If I do and he accepts, he is bound in faith to execute the trust (upon the principle of the obligation of promises which we shall hereafter consider.) And here it is observable, that in this endeavor to trace the *modus operandi* by which according to the principles of natural law a transfer of proper-

ty in the nature of a will may be made, we have hit upon that very contrivance invented by ecclesiastical ingenuity in the early ages of English history for the transfer of real estate by devise. For they were in the habit before the passage of the statute of wills, of effecting the object by a conveyance to a trustee for the use of the grantor, (or feoffor as he was called) during life and after his death, to such uses as he declared by the instrument of conveyance or should declare by any other instrument, to be executed by him. 1 Tuck. Com. Book 2. 285, Book 1, 32. The person accepting the deed was held bound in conscience to fulfil it and the courts of equity took care to see it enforced. Here too we see how wills of this kind were always revocable: for the grantee having accepted in the faith that he would after the grantor's death, transfer the estate to such uses as the grantor should direct, that direction might be varied to the last moment of his existence.

There is one limitation upon the power of disposition of property taken notice of by writers on natural law, which like most others, may be traced to the fundamental principles of the theory of property. I mean the inhibition to convey or devise real estate to an alien. This, as we shall have occasion to shew you hereafter, is matter of positive law, though with different degrees of rigor in different countries. The general principle with us, derived from the English law, is that an alien cannot hold land, but that when transferred to him it shall be forfeited to the state as soon as that fact is ascertained by the necessary proceedings. That such a provision is perfectly within the *power* of the body politic cannot be doubted; but it is interesting to enquire how far it is consistent with the principles of justice in reference to the right of property.

Now, we may remember that property has been said to be of two sorts, either general or particular:

general, that is the right of the whole society constituting a nation to the whole country which they take possession of; and particular, that is the exclusive right of each individual to such part as is allowed to him or falls to his share. To give an example. When our forefathers settled here, they appropriated this land to themselves exclusive of other nations. They parcelled it out by grants to individuals belonging to their own society. But it was at the same time declared by their law that no person but members of that society should hold any land within their limits. Now, if taking possession of, and appropriating the country, (which was before unsettled) to themselves was lawful and gave them a right to exclude others, the law which incapacitates aliens from holding lands is but an exercise of that right and therefore consistent with justice and the principles of natural law. Accordingly in many countries, among which we may name Great Britain and our own, the principle constitutes a part of the municipal law, though in Virginia, its rigor has been very much relaxed either through liberality or policy, by an act of assembly which allows an alien at any time before his land is taken by the commonwealth, to save the forfeiture of them by becoming a citizen himself or by transferring his rights bona fide by sale or demise, or transmitting it by inheritance to one who is a citizen. 1 R. C. Ch. 94. §2.

OF PRESCRIPTION.

Before we pass from the topic of the modes of acquisition of property upon principles of natural law, we must touch upon the subject of prescription, upon which many rights are vested under the regulation also of municipal law and the law of nations.

Prescription is a right to a thing acquired by a long, honest and uninterrupted possession, though before such possession some other person besides

the possessor might have been the owner of it ; and it is founded upon the presumed dereliction of any such former proprietor, if such there ever was. It is an answer to a claim of property by another upon the ground that he was once the owner. To that claim the present *possessor* demurs, by alleging, that admitting the claimant ever to have been the owner at a former period, his rights had been relinquished and abandoned, and a new and adversary right had been vested in the present holder by a long uninterrupted, honest and fair possession and enjoyment. This right has been denominated by writers on natural law as *usucaption*, a right by *prescription*. They both mean pretty much the same thing, that is to say, an acquisition of right by long and uninterrupted enjoyment and based on a presumed desertion, abandonment or consent of others. It is founded on the presumption that he who has a quiet uninterrupted possession for a number of years, must have had a right or he would not have been suffered to continue in the enjoyment of it. A long possession indeed may be considered as a better title than can commonly be produced ; for it establishes an acquiescence in all other claimants, and that acquiescence justifies the inference that there was some reason though perhaps unknown, why the claim was forborne. 2 Tho. Co. 198 in no. 3. Cruise 524.

In strictness the term prescription, however, is applied by us to the *immemorial* enjoyment of a right ; and our common law writers usually restrict it to what they call incorporeal hereditaments, which are certain rights or privileges exercisable upon the property of another : such as a right of way, or of pasture on his land, or a right to fish in his waters. An immemorial enjoyment of such rights gives a right by prescription. There is indeed an *analogous* principle in the English law extending to lands themselves, by which an interrupted possession for a certain number of years will give the *possessor* a good

title, by taking away from all other persons the right of entering upon them or recovering them. 3 Cruise 524. But this is not prescription, for it does not rest upon immemorial enjoyment. It rests entirely on statutory limitation. 2 Tho. Co. 198.

Mr. Vattel has placed the reasonableness of the principle of prescription, properly so called, as also of the limitation in relation to lands, which he calls *ordinary* prescription, in as clear a light as any other author. I must content myself however with referring to his work, Book 2, ch. 9.

I have said that prescription is a right acquired by long and uninterrupted possession; and these things must concur in order to constitute a valid right. It must have been immemorial, for the right itself resting upon an invariable acquiescence, if there be in the memory of man any evidence that there was a time when there was *no such* acquiescence, then the foundation of the pretension is itself destroyed: And this is the principle of the common law also. It must moreover have been uninterrupted for the same reason; though an interruption in the *enjoyment* of the right, after the title to it had been once established by time, would not affect the right, unless the interruption were itself so long, as to raise a presumption of acquiescence or abandonment in the party, who claimed by prescription. Lastly the possession must have been fair and honest it is said, (1 Ruth. 137,) though the remark can scarcely be considered applicable to an immemorial enjoyment, the commencement of which must be so hidden in remote antiquity, that no means could be resorted to for discovering the circumstances under which it was originally exercised. The principle is indeed undeniably true in most cases that he who would protect himself by long (though not immemorial) possession must show that his possession was unaccompanied by fraud or violence in its acquisition or by bad faith or other vicious taints in its con-

tinuance. But it can have no application to cases of prescription properly so called.

OF CERTAIN PRINCIPLES CONNECTED WITH THE
RIGHT OF PROPERTY.

“The first and most obvious obligation, that we are under, towards any person upon account of his property in a thing either moveable or immoveable, is to suffer him quietly to enjoy it, and to dispose of it, in what manner he pleases, without attempting by force or by fraud, either to take it from him, or in any respect to make it worse. This obligation plainly arises out of the notion of property: for his right to exclude us from meddling at all with a thing, would have no effect, or would be in reality no right; if we, notwithstanding such right, were at liberty to take the thing away from him, or hinder him in the use and enjoyment of it, or by any means to impair and waste it.

“As the right of property, which any person has in a thing, obliges us not to take that thing from him dishonestly; so it obliges us to restore it to him, or not to keep it from him, when we have, even by any honest means gotten it in our possession. When without any knowledge of the truth or any bad design on our part, a thing is given us, which belonged to some other person and not to the giver; when we purchase what some one else, and not the seller, had a right in; when we find a thing, the owner of which is not known, at the time of finding it; in such cases as those, our possession of the thing is honest, till we have found out the proprietor: but as soon as we have found him we are obliged, in virtue of his property, to restore the thing to him. For if we knowingly and designedly keep him out of what he has a right to, we do him the same harm, and consequently are guilty of the same injustice, as if we had taken it from him.

"From this obligation to restore any person's property, when it is in our hands, another obligation is derived, an obligation to restore the natural fruits, produce or advantages, which have arisen from it, whilst we were in possession of it: because the natural produce of a thing, and all the natural advantages rising from it belong as much to the proprietor, as the thing itself." 1 Ruth. 146.

But as the obligation to make restitution, of which we have been speaking, is imposed for the purpose of guarding against any injury to the right owner, so on the other hand it is reasonable that such limitations should be fixed to this obligation, as will guard the honest possessor from injury, except so far as that may be inevitable from the loss of property which may have cost him much in the acquisition. By that loss he must indeed abide; for as it is the first law of property that it cannot be lost to the true owner without his consent, so it is obvious that if I pay my money for his property, even to a wrong doer who has unlawfully (though without any knowledge of the wrong on my part) taken possession of it, it will furnish no reason for my keeping it to his prejudice. My resort must be to the man who has got *my* property, i. e. the money I paid him for that to which he had no title. And even if he be unable to make restitution, it is my misfortune and I must lie down under it. For either I or the owner of the property must suffer. And which ought to be the loser;—he who *has* right or I who have *none*? The question suggests its own answer. If there must be a loss it ought to fall on me and not on him, for he has neither parted with his property nor done any act for which he ought to be deprived of it.

And this brings me to remark upon a modification of the principle we are discussing. If the true owner by his conduct has contributed to the fraud which has been practised upon me, he could with no pretence of justice make reclamation of his property

from me. If he was *present* when I purchased his property, and had a full *knowledge* of his rights, and yet permitted another to sell it to me and to receive my money for it without objection, justice would cry out against his pretension to take the property from me. His conduct admits but of two constructions : he either assented to the transfer, or he combined to defraud me. If he assented to the transfer, then the right to the property passed to me, for nothing more was necessary than that it would be transferred to me with his consent, in order to convey his rights to me. If he combined to defraud me, he has committed an injury to me to the value of the property and I have a natural right to indemnify myself to the same extent. In either view of the case my right to the property becomes unquestionable.

LECTURE V.

I may seem perhaps unnecessarily minute, young gentlemen, in my developments of these principles of natural justice and law. But you will cease to think so when you learn, that many legal doctrines and a large branch of the principles of courts of equity is [most intimately connected with them. Thus it is a well established principle that my right of property is not lost, if another sells it without my knowledge or consent, express or implied ; as if my waggoner sells one of the horses of my team while he is on a journey, I may take him or recover him from the purchaser. *Hite vs. Long*, 6 Rand. Yet it is not less certain that if I had been present

when my horse was sold and made no objection to it, my right would be gone forever, since my assent to the act would very fairly be presumed. In equity, indeed, we meet with this principle in innumerable cases. However unquestionable my rights may be, I forfeit them, if I stand by and see another person contracting for them without announcing my title. Of this, a familiar instance is to be found in the subject of mortgages. If I have a mortgage on a tract of land for the payment of a debt, and I stand by and permit another person to lend another sum on the credit of the same land and to take a mortgage upon it from my debtor without disclosing my mortgage, I lose the preferable right to payment which I would otherwise have had. And though mine was the first mortgage and should have been *first* paid, yet by my conduct I have lost that right. The second lender will be first paid, and if there is not enough for both, I must be the loser. See 2 Tuck. Com. Book 3. Vol. 2, 422. 2 Leigh, 401. 1 Fonb. 151, 152.

To return however to the case of the true owner recovering his property from the person who came honestly into possession of it by purchase from a wrong doer. I have said that in this case while justice is rendered to the owner, no injury should be done to the possessor, except what is the inevitable consequence of his purchase of a bad title. And this principle is brought directly into operation in adjusting the question of rents and profits on the one hand, and permanent improvements on the other. For if another has been in the possession and enjoyment of my property for years, he has of course been receiving its products and profits, which it would seem as much belong to me, after making a due deduction for his labor in producing them, as the property itself. And of this opinion, it would seem, was the celebrated Grotius, who says that if the natural produce of the property is consu-

mable and the possessor has made use of them, he is bound to restore the value, because he has been the gainer by another's property. Lib. 2. ch. 10, § III. But though as a general rule, I have a just right to recover profits, yet, in many instances, the recovery may bear hard upon the possessor, who, having come fairly to the possession without a knowledge of the rights of the real owner, has freely *used* the revenues as his own. He *received* them as such without dispute, and had reason so to consider them when he used them. He has spent them with a liberality that nothing could justify but a just confidence that they were his, and now perhaps has no means of repayment. See *Skyring vs. Greenwood*. 4 Barn. & Cres. 281. It would seem therefore a hardship upon him to be compelled to account for them to one, who if he knew of his rights, should have asserted them, and if he did not, should perhaps be required to sit down in quiet under a loss, which must fall on one or other of two innocent men, and should therefore be left upon the shoulders of him on whom it already has fallen.

The hardship of such a requisition cannot be more forcibly represented, than has recently been done in the celebrated novel of "Ten Thousand a Year," in which the excellent Aubrey is beggared by the recovery of an estate which he had always every reason to suppose his own, and by the demand for rents and profits amounting to £60,000 sterling. All this had been liberally expended in the unstinted hospitality of an English gentleman, who looking upon the estate as his, disbursed its revenues without the remotest thought of retribution to any. The reader cannot fail to be deeply impressed with the hardship of the case, and to ask himself whether so rigorous a principle can really find a place in our laws. It may not be amiss to respond to that enquiry without going at large into the history of our decisions.

In early times, it was a principle of the English law that no damages should ever be recovered in a writ of right; which was a suit brought by the owner of land to recover the possession. At this late day it may not be easy to decide whether the principle arose out of feudal notions exclusively, or was in part adopted from the hardship of compelling the possessor of the estate who had disposed of its revenues among his followers and retainers as became the owner of lordly possessions, to refund those revenues to the true owner. Be this as it may, the rents and profits could not be recovered in a *droiturrel* action. In later times indeed, other actions have been introduced and other modes have been devised for recovering rents and profits. Moreover, in some actions, damages have been expressly allowed by statute to cover the rents and profits, so that it would seem that the right of the true owner has been vindicated and upheld by the municipal law of the country. Nevertheless, this has been not without modification or restriction; for even in a court of law, the true owner cannot go back more than five years before suit brought in his demand of rents and profits; all beyond that time being barred by the statute of limitations. A court of equity is yet more lenient to the holder where his possession has been without notice of the plaintiff's title, for then the true owner is allowed an account of rents and profits only from the time of filing his bill or commencing his suit. This would seem to be in strict conformity to the civil law which exonerates the *bona fide* possessor without notice of an adversary claim; but looks upon him as a *mala fide* holder from the time he has notice; and from that time accordingly charges him with the profits of the estate. Just. book 2, title 1, § 35, cited 8 Wheat 79. From this view of the subject, it would seem that with us the true owner is entitled to recover at law the rents and profits for five years anterior to the commence-

ment of his suit ; but he who is asking relief in equity can only charge the possessor from the time of the suit brought, if he held bona fide and without notice, though a mala fide possessor will be held liable for five years profits, and sometimes more.

Next as to *improvements* made by the holder during his possession. These are allowed him when the owner is guilty of fraud in permitting such improvements with full knowledge of his claim as has been more than once decided in our own courts. Southal vs. McKeand, 1 W. 336. 2 Ran. 14. 2 Tuck. Com. 411. In no other cases are they allowed except as an offset to the rents and profits with which the holder may be chargeable. 2 Ran 144. 8 Wheat. 79. Story's Eq. vol. 2. If the rule were otherwise ; if it were allowed to the intruder upon my lands to build upon it at his will and pleasure, and to compel me to pay for his improvements or give up the property, it would certainly justify, as Lord Clare once remarked, a proposition stated at the bar, that "it was a common equity in the court of chancery to improve the right owner out of possession of his estate." This seems to have been the obvious operation of the Kentucky occupying claimant laws, which would doubtless have swept the Virginia titles to Kentucky lands, but that the supreme court pronounced their law contrary to the compact between the states, and therefore unconstitutional and void.

OF OUR DUTY TO OURSELVES.

Having endeavored in a former part of these lectures to shew that there are certain principles of our nature which are so plain and undeniable, and so pervading and universal, as to entitle them to be denominated the *laws* of our nature, I shall now proceed to deduce from them our duties and our rights as arising out of them, and the correspondence

of these duties with the requisitions of municipal law.

It will be remembered that the great principles which I presented as being universally received and acknowledged were the principles of self preservation, the love of our offspring, the inclination between the sexes, the desire of property, and a propensity for association with our species. Others perhaps might without less propriety be added to these; but as these will abundantly suffice as foundations for the great principles of natural law in all its ramifications it will be both unnecessary and unphilosophical to add to their numbers.

The first in order and in importance of the laws of our nature, is the law of self preservation, and I shall proceed therefore in the first place to touch cursorily upon the rights which it confers, and the obligations it imposes on us in our pilgrimage here below. It may seem indeed at the first glance that the mere annunciation of the principle is all that is required for our direction, in the assertion of our rights and the fulfilment of our duties to ourselves. "Take care of yourself," is a command which you may think needs little reflection to be fully understood. Be not deceived. There is nothing which more requires to be sifted to the bran than this important duty. When we first look at it, no idea will present itself perhaps but the protection of our persons from the attacks of others, the acquisition of the means of comfort and enjoyment, and the security of those acquisitions from the invasions of those around us. But when we look a little deeper into the matter, we shall not only find other branches shooting forth from these, but we shall discover other not less important concerns, which demand the attention and consideration of every wise and reflecting being. The law of nature commands the protection of your person from danger and you obey it. It is well! but is this all? Does it command you to look only to the preservation of the body and

imply nothing of duty in the cultivation of the moral faculty, in the improvement of those intellectual powers which have made us lords of the creation, and in the perfecting of that being which was surely given to us for some more elevated object, than to eat and drink with the brute creation, or to vegetate and die with the short-lived plant we tread beneath our feet? We cannot think it. Turn your thoughts inward upon yourselves. Recall the sublime and noble images the poets give us of that being into whose hands is given the government of the world. Ovid tells us that when the waters of the deluge had receded and the inferior animals had been created;

*Sanctius his animal mentisque capacius altæ
Deerat adhuc, et quod dominare in cætera posset.
Natus homo est;—hunc divino semine fecit,
Ille opifex verum, mundi melioris origo;
Finxit in effigiem moderantium cuncta Deorum;
Proua que dum spectent animalia cætera terram,
Os homini sublime dedit; cælumque tueri
Jussit et erectos ad sidera tollere vultus.*

I should be much obliged if any member of the class could recall a passage from one of our own poets which embodies these beautiful thoughts in our mother tongue. I have endeavored in vain to recollect it. For want of it I am compelled to offer you a version in my own more homely phrase.

*Still there was wanting in the new-born world,
Some nobler being, some diviner mind,
That o'er the earth and all that is therein
Might hold the mastery! Straightway man was born,
Created by the eternal architect of things,
And springing from a seed divine, or bearing in his soul
The spirit of its cognate skies, immortal!
Him the great father formed in image of the gods,
The rulers of the world, and while the brutes,
Groveling look down upon their native earth,
He gave to man a countenance sublime,
And turn his gaze upon the radiant stars,
And lift his contemplation to the skies.*

The law of our nature then, which commands us

to seek our own preservation, commands us by necessary consequence to labor after the perfection of this noble being ; to carry forward by our own efforts and exertions the beneficent intentions of nature in making us what we are, and to secure our own happiness by the judicious use of the ample means with which she has invested us, for advancing our own good and elevating ourselves in the scale of existence. In this view of our subject, our horizon becomes expanded, and we are relieved from the mortifying thought that all our duties to ourselves are confined to the narrow circle of providing for our animal enjoyments. We push our speculations into the region of the moral law, and looking upon man as a responsible being,—responsible not only for his duty to others, but for his own improvement and perfection—we enter with the liveliest interest into the search after those rules of action, which are calculated to make us wiser and better, and therefore infinitely more happy.

This pleasing theme, however, is not for me. It belongs more properly to another department of this institution, in which it is doubtless presented with all the interest and force of which it is worthy, by the ability and taste for which the professor of that department is so eminently distinguished.* From his lips you may learn those duties to ourselves which are dictated by the moral law, and are written upon the heart of man by the finger of Him who made him. The beauty and excellence of virtue, its influence in promoting the happiness of ourselves and others, the benefits of chastity, sobriety and temperance in all things, the advantages of industry in the promotion of our health, our happiness and independence, and the cultivation of our intellectual faculties as the effectual means of elevating ourselves to the highest degree in the scale of social power and influence, are all topics which doubtless

* Professor George Tucker.

derive new interest from his manner of presenting them. While on the other hand, the deformity of vice, the disgusting spectacle of the victim of the bottle, or the melancholy picture of the wretch who issues from the stews, emaciated by libertinism, and, wasted by disease, rise up under his vivid description before our view, and frighten us from the paths of vice by the vivid representation of its consequences.

There is indeed, young gentlemen, no topic which can more properly employ the powers of a man of genius. In the thoughtless days of our youth, we are too little accustomed to look to consequences in weighing the merits of a single action. It requires that they should be pointed out and so vividly portrayed, as to leave an impression that cannot be obliterated by the action of our passions in the moment of temptation. The mind must be compelled not only to *admit*, but habitually to *feel*, that we best consult our happiness in pursuing the paths of virtue. If vice has no other ill, it brings the bitterness of reflection. He who yields to its temptation, will sooner or later find himself compelled to feed upon regrets. Repentance is the bitter potion that he must drain even to the dregs. There is a word in the English language that comes home to the bosom of every wicked man. He at least needs ask no exposition of its meaning! That word is *remorse*! It is a drop of God's wrath falling upon the soul and giving to the wretch a bitter foretaste of the awful terrors of future retribution!

Among the incidents, which have been handed down to us from antiquity, of the schools of philosophy, there is one which always struck me in my early days with peculiar interest. One of the philosophers of the portico, whose days were passed in delivering the lessons of wisdom to admiring crowds, was one day teaching, when a band of libertines chanced to pass that way. They were fresh from

their bachanalian orgies, and from the embraces of the wanton Lais and her voluptuous companions. Their robes were loose and flowing as was the custom of the dissolute in their festive entertainments, and their brows were crowned with flowers, with the effeminacy of the maiden. At their head was a youth more conspicuous than the rest for the beauty of his countenance and the attractions of his person, as well as for the extravagance of his attire, and the dissoluteness of his air. As they approached the portico which was resounding with the lessons of wisdom from the lips of the venerable philosopher, the attention of the profligate young man was caught by the sage's voice which fell in sweetest accents on his ear. He paused. He listened. The sage was dwelling on the dignity of virtue, and the beauty of a life of temperance and chastity. He expostulated on the calm of the good man's breast and the serenity and cheerfulness of a life of innocence and purity. Suddenly he changed his theme. The libertine was the subject of his discourse. With a master's hand he sketched the character before him. In colors true to nature, he depicted the ugliness of vice, the disgusting features of the drunkard, and the debasing and demoralizing influence of lewdness and debauchery. His eloquence and argument sunk into the soul of the wild young man. He was seen to draw more modestly around him his loose and flowing robes, and to steal from his forehead and his burning temples the chaplets that adorned them, and cast them beneath his feet. When the discourse was ended, he presented himself with humble mien before the sage, and sought to be enrolled among his followers. His request was acceded to, and he soon became eminent for his wisdom and his virtues.

The actors in this ancient story were Xenocrates, a disciple of Plato and Polemo his disciple, though the story has also been told, I think, of Socrates and Alcibiades.

Leaving however, gentlemen, to another, the inculcation of these moral duties to ourselves, I pass to the less interesting task of pointing out the rights with which we are invested for self protection and defence. Now the natural right of self defence is nothing more than the liberty which the law of nature allows us of defending ourselves from an attack which is made upon our persons or of taking such measures as may guard against any injuries we are likely to suffer from another. It gives us, it is true, a similar right where our property, or those standing in the relation of wife or child are assailed, or in danger, but I prefer to consider those matters under a separate head. At present we shall consider the defence of the person only.

And here in answer to the question which has been discussed at such learned length by others, as to the extent to which a man may go in self defence, I reply that as the law of nature allows us to defend ourselves, and imposes no limit upon the right, the only limit we can impose is the necessity of the case. Whatever means are necessary must be lawful; for the rule is general, that where a right is absolutely given, the means of exercising it must also follow. On the other hand as the right of self defence is only given for our protection, it cannot lawfully be carried farther, so as to justify an unnecessary injury to the wrong doer. And thus it is on the one hand, that the fierceness of the assault may justify the putting our adversary to death, while on the other, such extreme retaliation could never be justified, where the injury is slight or the danger is not imminent either to life or to limb. Others have indeed resorted to the principle of benevolence, to restrain the violence which would seek to redress the slightest injury by the death of the assailant. 1 Ruth. 369. But it seems to me that upon the principle above mentioned, the repelling of an assault can only be carried so far as is necessary to that end. And this

is without doubt the principle of the common law which permits any degree of violence if necessary for the safety of the person, *but no more*. 1 Wh. Sel. 22. Thus in the case of Cockroft vs. Smith, 2 Salk. 642, in an action of assault and battery and mayhem, the plea of son assault demesne was held to be a good plea, because it *might* be such an assault as endangered the party's life: but upon the question, "what assault was sufficient to maintain such a plea in mayhem," Holt C. J. said "that Wadham and Wyndham justices would not allow it if it was an unequal return; but that the practice had been otherwise and was fit to be settled: that for every assault he did not think it reasonable that a man should be banged with a cudgel, and that the meaning of the plea was that he struck in his own defence. That if A strike B, and B strike again, and they close immediately, and in the scuffle, B maims A, that is son assault; but if upon a little blow given by A to B, B gives him a blow that maims him, that is not *son assault demesne*." See also 1 Lord Ray, 177.

"There is one case in which all extremities are justifiable, namely, when our life is assaulted, and it becomes necessary for our preservation to kill the assailant. This is evident in a state of nature; unless it can be shown, that we are bound to prefer the aggressor's life to our own, that is to say, to love our enemy *better than* ourselves, which can never be a debt of justice, nor any where appears to be a duty of charity. Nor is the case altered by our living in civil society; because, by the supposition, the laws of society cannot interpose to protect us, nor by the nature of the case compel restitution. This liberty is restrained to cases, in which no other probable means of preserving our life remain, as flight, calling for assistance, disarming the adversary, &c. The rule holds, whether the danger proceed from a voluntary attack, as by an enemy, robber, or assas-

sin or from an involuntary one, as by a madman, or person sinking in the water and dragging us after him; or where two persons are reduced to a situation, in which one or both of them must perish; as in a shipwreck, where two seize upon a plank, which will support only one: although, to say the truth, these extreme cases, which happen seldom, and hardly, when they do happen, admit of moral agency, are of little interest except as matter of debate."

In perfect consistence with these principles are the laws of civil society. The killing of a man *se defendendo* is excusable; and this whether it is in defence of my life or necessary for the defence of my person against great bodily harm. And in like manner, our law justifies a woman in killing one who makes a forcible attempt upon her chastity. Yet the right of self defence, and of killing the aggressor in case of a violent assault which endangers life or limb, is only justified by law, when the person who kills, retreats, as far as he conveniently or safely can, to avoid the violence of the assault, before he turns upon the assailant. But if he be prevented by a wall, or ditch, or other impediment, or indeed by the fierceness of the attack, which will not allow him to yield a step without manifest danger of his life or of enormous bodily harm, then in his defence he may kill his assailant instantly. 4 B. C. 185.

Immediately connected with the duty of *self* preservation, is the preservation and protection of those who stand in the near and interesting relations of wife or child, or even in that of master and servant; for all these are excusable for killing an assailant in the necessary defence of each other respectively; the act of the relation assisting, being construed the same as the act of the party himself.

Nor indeed is the right of defence confined by the principles either of natural or municipal law to the *persons* of ourselves and of those connected with us. It is extended to our property or possessions.

- It grows out of the very establishment of property.
- If my right to it is invaded, if another seeks to take it from me, how can it be preserved, but by my defending it? I must therefore, as in the case of my person have a right to the use of all the means which the invader makes necessary for the protection of what is my own. If his attempt requires no violent or forcible act of defence, force may not be justified: but if his attack be violent, I have a right to repel, force by force, and by the law of nature even to the death; for in a state of nature there is no appeal to any power but force to give to me redress. But in a state of society, tribunals of justice are erected for redressing wrongs, and the life of man cannot therefore be sacrificed for the commission of a trespass, or the invasion of my right of property except under particular circumstances. Thus a homicide committed for the prevention of any forcible or atrocious crime against my property, is justifiable by the law of the land as well as by the law of nature. Puff. L. N. 1-2, c. 5. 4 B. C. 180. As if a person forcibly attempts to rob me, or to break open my house in the night time, or to burn it, and shall be killed in the attempt, I am held guiltless by the law; for I have only inflicted that punishment, which the law would have denounced against him, had he succeeded in his attempt. But in tenderness to human life, the law will not permit a like step to be taken in the case of commission of crimes unaccompanied with force, such as stealing or picking pockets; as the law itself does not punish these offences with death. And herein probably the natural rights of the injured party may be, in some degree restricted and curtailed by the benevolent institutions of society.

By the law of Moses, "if a thief be found breaking up, and be smitten that he die, there shall no blood be shed for him. If the sun be risen upon him there shall be blood shed for him, for he should

make full restitution. If he have nothing, then he shall be sold for his theft." Exodus, ch. 22, v. 2, 3. The meaning of this is obvious. If the house-breaker *by night* is killed, the slayer shall not be punished; but a house-breaker *by day* can be known and brought to justice; wherefore the Mosaic law denied impunity to him, who should slay him, for he might get retribution by appeal to the laws, and was not therefore justified in spilling the blood of the aggressor.

With respect to the defence of our property the writers on natural law very generally agree; though they differ as to the extent to which the defence may be carried. Mr. Rutherford very justly observes, that it is plain from the foundation of the right that it is indefinite, and that we are not naturally debarred from proceeding to extremities in defence of our goods, where the obstinate injustice of him who would take them from us, makes this extremity necessary. For as the law of nature does not oblige us to part with our goods against our will, it cannot be supposed to prescribe any particular mode of defending them; since to prescribe such means, as the only lawful means, would in effect be obliging us to part with our goods when those means fail. But the learned Grotius, who seems to have had a favorite principle in his mind, that we ought not to take away any one's life *immediately or directly* for the sake of preserving our goods, *allows* that we may defend them, till our own life is in danger, and *then* we may justly kill the robber; a notion utterly unworthy, it seems to me, of the great mind to whose talents and erudition the world has been so largely indebted, for the lights it possesses on the subject of the law of nature and rights.

In conclusion of these remarks on the law of self defence, I must not omit to mention the subject of duelling; but the topic has been so hacknied, and I am so conscious that I have nothing new to add for

its illustration, that I shall content myself with referring to the writers on natural law, who have heretofore treated of it. I shall only observe that the municipal law looks upon it with no grains of allowance; that sending a challenge is itself made penal, not only as a violation of the peace, but by absolute disqualification for public office; and that killing in a duel is murder, and punishable as such. The frequency of the offence has been very greatly diminished in the commonwealth of Virginia, by the salutary influence of the statute for its prevention, and we are not without reason to hope that the time will yet come, when the custom will be as obsolete, as the absurd and barbarous trial by battle, from which it is a scion.

OF THE DUTY OF PARENTS.

The next great law of our nature which I shall proceed to consider together with the rights and obligations which spring from it, is the love of our offspring. It is a sentiment as general as the day, and those of our race have been held up as monsters, whose bosoms have been steeled to its tender and amiable emotions. Such instances have been rare, though it is lamentably true, that in human life, parental care lags far behind parental tenderness. Sometimes the natural affection wastes itself in womanish fondness for the person of the child; in improvident attention to his present ease and gratification; in a pernicious facility and compliance with his humors, and excessive and superfluous care to provide the externals of happiness, with little or no attention to the internal sources of virtue and satisfaction. Sometimes we see the parent so absorbed with the trifles of life, sometimes so taken up with its cares, sometimes so busied with the game of ambition or occupied with the accumulation of wealth, that the mind and the manners, the heart and the principles of the object of his most devoted affection, are left

to the training and the moulding of some hired inferior, who in his turn neglects the essential duties which had been found too burdensome even for a parent. How important then, that these momentous matters should be impressed upon the minds of the young, before they themselves are ushered up on the theatre of life, where in turn they must fulfil these solemn duties, or incur the hazard of having their omissions brought home to their bosoms by the aberrations of those who are most dear!

The natural affection for the child impels the parent to its maintenance and support. In relation to the mother, nature speaks in a language that addresses itself to the senses, and silences the most sceptical. The provision she has prepared in the person of the parent for the sustentation of the child, furnishes the most distinct and manifest indications of her intentions. Fed from the breast of the mother for the first few months of its existence, it soon however must look to some other hand for its support during the period of infancy and youth. The heart of the father is tutored by the same informing spirit, to yearn over the offspring of his body and to labor for its sustenance. From these lessons we learn the first duty of the parents; the duty of maintenance and support. On them alone can the child depend for succor, for others will not take the burden that the parent throws aside.

It is one of the most inexplicable facts in the history of our jurisprudence, that there is no distinct provision made by law enforcing this most natural and important duty. The putative fathers of bastards, indeed, are compelled to indemnify the parish during the infancy of the child, and the offspring of the dissolute and thoughtless who cannot support them, may be taken from their parents and bound out to a trade; but there are no means of compelling a parent to support his child if he is deaf to nature's dictates.

The same thing may be said of education. "Education," says an author of great strength of mind and much good sense, "in the most extensive sense of the word, may comprehend every preparation that is made in our youth for the sequel of our lives: and in this sense I use it.

"Some such preparation is necessary for children of all conditions, because, without it, they must be miserable, and probably will be vicious, when they grow up, either from want of the means of subsistence, or from want of rational and inoffensive occupation. In civilized life, every thing is effected by art and skill. Whence, a person who is provided with neither (and neither can be acquired without exercise and instructions) will be useless; and he that is useless, will generally be at the same time mischievous to the community. So that to send an uneducated child into the world is injurious to the rest of mankind; it is little better than to turn out a mad dog, or wild beast into the streets.

"In the inferior classes of the community, this principle condemns the neglect of parents, who do not inure their children by times to labor and restraint, by providing them with apprenticeships, services, or other regular employment, but who suffer them to waste their youth in idleness and vagrancy, or to betake themselves to some lazy, trifling, and precarious calling: for the consequence of having thus tasted the sweets of natural liberty, at an age when their passion and relish for it are at the highest, is, that they become incapable for the remainder of their lives of continued industry, or of persevering attention to any thing; spend their time in a miserable struggle between the importunity of want, and the irksomeness of regular application; and are prepared to embrace every expedient, which presents a hope of supplying their necessities without confining them to the plough, the loom, the shop, or the counting-house."

In the higher orders of society, those parents are not less reprehensible who neither qualify their children for a profession, nor enable them to live without one. Some, from indolence of spirit, take not the necessary steps; others, from grovelling avarice, cannot find in their hearts to take from their hoard the necessary means, and others cannot *spare* them from their pleasures, their luxury or their splendor. From one cause or other, too many deny to their children those liberal attainments which are necessary to make them useful in the stations to which they may be called; without reflecting that a man who can afford to educate a promising son, and who permits him to consume the season of education in idle pleasures, defrauds the community of a benefactor, and nine times out of ten, brings a disgrace upon himself.

These sacred duties, however, are not enforced by law. Credit is indeed due to our legislative body for their exertions in the cause of literature, displayed in their general school fund, and in the establishment of this noble institution. But much yet remains to be done in awakening our people to the enjoyment of these advantages. An hundred and fifty youths within these halls, are but a poor contribution to science, from 1,000,000 people. And when it is recollected that in our republican institutions the avenues to the highest stations are open to all, and that education and the sedulous cultivation of the intellectual powers is the great secret of success, our wonder grows, at the culpable apathy of parents in the discharge of the great and important duty, of accomplishing their sons for the highest honors in the state.

This brings me to remark upon the crowning duty of a father to his child. To him it belongs when maturity has fitted the young man to enter upon the duties of life, to usher him forth into the world in some fit and appropriate occupation. While we ad-

mit in ^{their} fullest extent the principle of equal rights, and put far from us the supercilious hauteur which is foreign to the nature of our institutions, we cannot wink so hard, as not to see, that there must and will be grades in every society growing out of the difference between intellectual and handicraft pursuits. It is not every man, who can afford to bring up his son a statesman, and 'tis not less true that *ex quovis ligno non fit Mercurius*. Our duty therefore, depends in no small degree upon our situation. We are not to blame if we fall short, for want of power, of what others do. But at least to one thing should we all aspire;—to keep our sons from losing caste, and sinking in society below the grade we occupy ourselves.

“Hence, a farmer satisfies his duty, who sends out his children, properly instructed for their occupation, to husbandry, or to any branch of manufacture. Clergymen, lawyers, physicians, officers in the army or navy, gentlemen possessing moderate fortunes of inheritance, or exercising trade in a large or liberal way, may be expected by the same rule to provide their sons with learned professions, commissions in the army or navy, places in public offices, or reputable branches of merchandise. Providing a child with a situation too, includes a competent supply for the expenses of that situation, until the profits of it enable the child to support himself. Gentlemen of fortune, may be expected to transmit an inheritance to the representatives of their family, sufficient for their support, without the aid of a trade or profession, to which there is little hope that a youth, who has been flattered with other expectations, will apply himself with diligence or success.”

But these should yet be fitted by education and thorough culture for some important duty or employment. There can be no drones in our hive. Every man must be *something* or he will soon be *worse than nothing*. It is the immutable law of

our country ;—“ unshunnable like death.” All however that can be expected from parents as a *duty*, and therefore the only rule which a moralist can deliver upon the subject is, that they endeavor to preserve their children in the station of life in which they are born, that is to say, in which others of similar expectations are accustomed to be placed ; and that they be careful to confine their hopes and habits of indulgence, to objects which will continue to be within their grasp.

Lastly, let me remark upon the subject of paternal duty that it behoves the parent so to model his intercourse with his son as to win his confidence and deserve his friendship.

“ A good parent’s first care is to be virtuous himself ; his second, to make his virtues as easy and engaging to those about him, as their nature will admit. Virtue itself offends, when coupled with forbidding manners. And some virtues may be urged to such excess, or brought forward so unseasonably, as to discourage and repel those, who observe, and who are acted upon by them, instead of exciting an inclination to imitate and adopt them. Young minds are particularly liable to these unfortunate impressions. For instance, if a father’s economy degenerate into a minute and teasing parsimony, it is odds, but that the son, who has suffered under it, set out a sworn enemy to all rules of order and frugality. If a father’s piety be morose, rigorous, and tinged with melancholy, perpetually breaking in upon the recreations of his family, and surfeiting them with the language of religion upon all occasions, there is danger, lest the son carry from home with him a settled prejudice against seriousness and religion, as inconsistent with every plan of a pleasurable life, and turn out, when he mixes with the world, a character of levity or dissoluteness.”

I know of nothing, indeed, which leaves a more unfavorable impression on the mind, than that dis-

tance and reserve to which injudicious austerity gives rise; nor is there a more pleasing spectacle than parental dignity, softened by easy and judicious familiarity; and filial obedience and respect equally removed from unbecoming freedoms on the one hand, or cold reserve and habitual constraint upon the other. If nature has given to us children, why should we not make of them, friends? In vain has she given to me a father, if I find in him the austerity of a master, or the moroseness of a brute. He but ill discharges the duty of a parent, who chills the warm affections of an amiable child by forbidding manners, or withers the growth of youthful confidence by undue severity or reserve.

In my next lecture, I shall take up the subject of a parent's authority as sustained by the law of nature, not less than by municipal law.

LECTURE VI.

OF THE RIGHTS OF PARENTS.

The natural right of a parent over a child is the obvious consequence of his duties. His power and authority over him from infancy to maturity, springs not from the obligation of love and gratitude which the child most certainly owes for the cares and protection he has received at a father's hand. This obligation is *imperfect*, as I have already had occasion to observe, and is moreover in no degree enforced by the regulations of society. But the father's authority over his offspring is perfect from childhood to maturity, according to that axiom of the moral law,

that when a duty is imposed, all powers are given which are needful for its discharge. As therefore the father is bound to bring up and protect his child, and as in infancy and youth, the child is incapable of self support, or self government and direction, it follows that nature herself, who devolved upon him his duties, invested him at the same instant with all the authority necessary for their fulfilment. And this independent of all civil institutions ; for if any of those horrible shipwrecks, the recitals of which, so often chill our veins, a father and son had been cast upon a desert shore where the bands of civil authority were never known, the father's rights, the father's power would still have been as unquestionable as under the dominion of the law in the civilized countries of the world. It is the law of *nature*.

When we look to society, the right is yet more plain and far more extended. For as the right and the authority must ever of necessity keep even pace with the duties imposed upon the parent, they must be almost immeasurably multiplied by the vast increase of obligation devolved upon him in a state of civilization. In a state of nature, the wants of the child are simple ; the rights of the parent few. It would be his duty indeed to teach him how to help himself, and thus far his powers would extend. But see him in society ! How multiplied a father's cares, how numerous a parent's obligations ; how broad the power therefore that is given to fulfil them. In society as well as in a state of nature, the rights of parents result ever from their duties. If it be the duty of a parent to educate his children, to form them for a life of usefulness and virtue, to provide for them situations needful for their subsistence and suited to their circumstances, and to prepare them for those situations ; he has a right to such authority, and in support of that authority a right to exercise such discipline, as may be necessary for these purposes.

The law of nature acknowledges no other foundation of a parent's right over his children, besides his duty towards them (I speak now of such rights as may be enforced by coercion.) It confers no property in their persons, or natural dominion over them, as by some has most erroneously been supposed. It is shocking to the moral sense to find among the lucubrations of the most distinguished writers on natural law the assertion of this natural dominion in its most revolting character. The law of nature, says Mr. Rutherford, may, in some cases, allow parents to *sell* their children. "If they are unable to sustain the child, says he, there seems to be no reason against the selling it to any one who will undertake the expense and trouble of bringing it up. The usual event of such a sale is the *slavery of the child*!"

If nothing more were meant in this extraordinary passage than that during the pupillage of his offspring, an indigent parent might invest another with his power and control, in consideration of the support and education of the child, it might not be deserving of very serious animadversion. It would present the case so common in an advanced state of society, of the child of a poor parent being bound by the father, with the assent of the child, and the public authorities, to some person as apprentice, in whose powers little short of parental authority are vested by law. But the author will not permit himself so to be misunderstood. In a subsequent part of his volume he goes into a systematic defence of his position, and carries it out in all its enormity. That I may do no injustice to his views, I shall present them to you in his own language. He is speaking of the origin of slavery.

"But slavery," says he, "though it is not the natural state of any man, may be introduced consistently with the law of nature. First; a man may come into a state of slavery through the act of his

parents. The law of nature obliges the parent to maintain their child. But it is possible for them to be in so low a condition, as to be absolutely unable to discharge this duty in their own person, and to be under a necessity either of suffering the child to perish, or of procuring some other person to discharge it for them. In these circumstances, if civil laws had made no better provision, the law of nature seems to allow them rather to put the child into the hands of any one, who would upon his own terms undertake to preserve its life, than to suffer it to perish for want of common necessities. Nature indeed gave the parent authority over the child in view to the child's benefit : and he, who undertakes to maintain it and bring it up, upon condition of its being his slave, has his own benefit principally in view. It may therefore well be asked, whether the parents have authority to dispose of the child upon these terms. To this it may be answered, that the parents, through want and infirmity, being under a necessity of leaving their child to starve, or of accepting these conditions, provide for its benefit, as well as they can, by delivering it up to any person, who will undertake to subsist it even upon the condition of its being bound to act for his benefit, as long as it lives. There may however be a farther question, how it is possible for the temporary right of the parent over the child, to produce a perpetual right in the master over it as a slave. And undoubtedly, if there was no other cause of the master's power besides the parents act, the slavery of the child would cease, when it comes to years of discretion. As the authority of the parent ceases at that age, the power of the master, if it was derived solely from that authority, could subsist no longer. But the master undertakes from the first to maintain the child, in view to his own benefit ; and consequently its maintenance is not to be considered as a bounty bestowed upon it by the master. If then he does not give

the child its maintenance, the child must be his debtor for such maintenance; and, upon account of this debt, he claims a right to direct its future actions for his own benefit. Nor will the labor of the child, after it is grown up, discharge this debt, so as to redeem it from slavery: because its future labor will be due to its master for its future subsistence: and the original debt will upon this account still remain unsatisfied. This original debt may indeed be greater, than what arises from barely maintaining the child, whilst it was unable to work: for as the parents, though they were under a necessity of disposing of their child to some one, were at liberty to dispose of it to whom they pleased; the master may have given them money to engage them to let him have the child, rather than any other person. And whatever he has thus paid to the parents is to be placed to the child's account, and becomes a part of the debt, which it owes to the master.

"We may observe by the way, that when we speak of parents selling their child into slavery, nothing more can be meant by it, than that the purchaser, as we call him, gives the parents some valuable consideration to engage them to let him rather than any other person, acquire a right to the service of the child, by maintaining it in its infancy, whilst it is unable to earn its own living. For certainly as the child is not a slave to its parents, they can have no immediate right of making it a slave to any one else: nor can they, properly speaking, so sell it, as that the purchaser shall immediately by their act acquire a right to direct all the actions of the child for his own benefit."

Yet notwithstanding the seeming disclaimer which is contained in the last paragraph of the quotation of the parent's right to make a slave of the child to any one else, because he was not *their* slave, yet the whole passage taken together, unequivocally evinces that the author thinks that he might be made a slave

“*through* the act of its parents.” They sell their right for a *price to be paid to them!* which price becomes a *debt from him* to the purchaser; and he thus becomes a slave, forever, because he can never pay the debt, as his future labor will be due to his master for his future subsistence! Heaven protect us from such flimsy reasoning—such miserable sophisms. It would be an insult to your understanding to enter into a serious refutation of them. I only ask leave to remark that if a man cannot sell himself, *a fortiori*, another can’t sell him; and to refer to the just remarks of Mr. Blackstone, in his *Commentaries* on the Laws of England, as to the supposed capacity to sell oneself.

But notwithstanding the right to sell a child is denied to the parent, not less by nature, than it is by law, yet during the minority the parent’s powers are little short of absolute. Their authority and control is given upon the presumption that as the child has no adequate reason of its own to judge, and no enlightened will of its own to choose what is best, the parent whose duty it is to take care of it, is to judge and determine for it. It is not recognized as having any will of itself, and is indeed under the absolute direction and control of those to whom it owes its being. Now, no power can be more complete than this, where the reason of another is the *sole* guide of my actions, and *my* will is concluded by the exercise of his. During childhood, indeed, it is in practice as unlimited as it is in theory; and though in reality it relaxes as the day of emancipation is drawing near, yet the leading strings are not slipped nor the trammels taken off, until the youth is “disenthralled” by the magic of “*twenty one*.”

In representing however the authority of the parent as little short of absolute, I must not be understood to mean that the exercise of that authority to the *prejudice* of the child can be justified by the law of nature or society. It has its limits. The pa-

rent has indeed the power of correction and coercion; but they must be exerted with the moderation and forbearance which so tender a relation demands, while they are exercised with the steadfastness and the firmness which the occasion may require. Conscience—nature—law would equally cry out against a parent's cruelty and injustice, and forbid not only assaults upon the life, but unfeeling cruelty, unusual punishment or unreasonable confinement of the person of his unhappy child. His power is given for the benefit not for the destruction of the being thus placed under his control; and the duty to maintain and bring him up, can never reasonably be supposed to give a right to injure or to maim him, to practice against his life, or incarcerate him as a felon.

The provisions of the municipal law are very much in keeping with those of the law of nature to which I have been adverting. The authority of the parents over their offspring is derived from the consideration of their duty, and is therefore co-extensive, but not more than co-extensive with it. By the Roman law, indeed, it extended to life and death, the father's power to take away life having been most falsely founded upon the notion that he gave it. But the common law which is the substratum of our own, does not so deem of parental rights. The power of a parent by that law is far more mitigated and temperate, but still sufficient to keep the child in order and obedience. He may lawfully correct him while under age in a reasonable manner, for this is for the benefit of his education; and we have moreover seen that the consent of the parent, if not essential to the validity of a marriage, is nevertheless necessary to be had, before a license can legally issue for its celebration. Moreover, the parent is empowered to put a refractory child under restraint; to coerce even by the aid of a court, if it be necessary, his attendance on the school he deems proper, and in

all things, to direct the course of his instruction and education, subject indeed always to the control of the supervisory tribunals established by the laws. It remains but to remark that, as the mother herself owes obedience to the father, her authority must submit to his. In a competition, therefore, of commands, the father is to be obeyed. In case of the death of either, the authority, as well as duty, of both parents devolves upon the survivor.

LECTURE VII.

OF PROMISES,

There is nothing in relation to natural duty, which requires to be more clearly understood, or which has more frequently been the subject of subtle and unfounded distinctions than the doctrine of promises. I shall therefore, in the following lecture, not only offer you such views of the matter as suggest themselves to my own mind, but shall draw liberally upon the labors of others, so far as they seem worthy of adoption; for as the object of these lectures is *your* improvement and not *my own* distinction, I can permit no false pride to induce me to discard what may be worthy of your consideration, and to confine you altogether to my own crude and less reflected lucubrations.

The obligation to perform promises may be most properly deduced from the necessity of doing so, with a view to the well being, or indeed the very existence, of human society. Among those principles, which in an early lecture, were pointed out as

constituting the laws of our nature, was that disposition for an intercourse with our species, which we supposed to animate every human being, whose heart is in the right place. We meet throughout nature, indeed, with anomalies; and anomalies may as well exist in relation to the social principle as in relation to the animal structure, or the character of the intellect. There may be brutes, it is true, who fly from their kind, under the goadings of a sour misanthropy; but even these, perhaps, are born with better feelings, which evil passions, or the hard unkindness of a cheerless world may have withered prematurely. The mass of our race have a fondness for an intercourse with man. Society is as necessary to our happiness and enjoyment, as it is demonstrably essential to our comforts, to our acquisitions, to our welfare, and to our advance in the progress to that degree of perfection of which our being is susceptible. It thus becomes our duty to cultivate assiduously all those moral virtues, which lead directly to the promotion of the prosperity and welfare of society; and among these none is more conspicuous in its influence than a sacred observation of the obligation of promises. This will become manifest from a few simple considerations.

“Men act from expectation. Expectation is, in most cases, determined by the assurances and engagements which we receive from others. If no dependence could be placed upon these assurances, it would be impossible to know what judgment to form of many future events, or how to regulate our conduct with respect to them. Confidence, therefore, in promises is essential to the intercourse of human life; because, without it, the greatest part of our conduct would proceed upon chance. But there could be no confidence in promises, if men were not obliged to perform them; the *obligation* therefore to perform promises is essential, to the same end, and in the same degree.”

There are many, not improbably, who have not duly considered the infinite variety of promises upon which the intercourse of life essentially depends. "But it may easily be imagined, if we will only reflect," says Mr. Paley, "how every hour of our lives we trust to, and depend upon others; and how impossible it is, to stir a step, or, what is worse, to sit still a moment, without such trust and dependence. I am now writing at my ease, not doubting (or rather never distrusting, and therefore never thinking about it) but that the butcher will send in the joint of meat, which I ordered; that his servant will bring it; that my cook will dress it; that my footman will serve it up; and that I shall find it upon the table at two o'clock. Yet have I nothing for all this, but the promise of the butcher, and the implied promise of his servant and mine. And the same holds of the most important, as well as the most familiar occurrences of social life. In the one the intervention of promises is formal, and is seen and acknowledged; our instance therefore, is intended to show it in the other, where it is not so distinctly observed."

A promise *ex vi termini* implies something not present, but to come. It is an assurance or engagement given by one person to another that he will do or perform some act in which that other is interested. And this definition embraces the promise of giving, as well as the promise of doing, which by some writers have been distinguished though without sufficient attention to the real character of the act. A present gift is indeed an act done and complete; but a *promise* to give is not itself a gift, but a mere engagement to perform the act of giving at a future time. Of whatever character, however, the assurance be, it naturally gives rise, in the breast of him to whom the promise is made, to an expectation of its fulfilment. This expectation is calculated to influence his conduct; and a failure to fulfil the promise may not leave the party in the same

condition in which he would have been if no such expectation had been raised. His pursuits may have been changed, and he may have been led to abandon schemes, or to launch into expenses, of which he would not otherwise have even dreamed. Thus circumstanced, it were cruel to deceive him, and the moral law distinctly points out, therefore, fidelity to our promise, as the path of moral duty. Honor and conscience command a strict fulfilment of engagements. The laws of both forbid a breach of faith: and where the question is only as to what *they* dictate, no room is left for doubt or cavil. But in truth, it often happens that promises, however great their obligation in point of conscience, are yet *imperfect* in the rights they give: and hence 'tis needful to look more deeply into things, in order to discover those principles, on which alone a promise will confer a *perfect* right.

Now, the first thing to be remarked in this regard, is the absolute necessity of some consideration to support the promise. If without any consideration of benefit to myself or detriment to another, I promise to give him a certain sum, or do a certain act; however I may be induced by a sublimated honor to fulfil my promise, though he has no manner of claim upon me, yet it would certainly be most unreasonable if I refuse to perform, that he should compel performance when he has given nothing, and done nothing, and suffered nothing which would give him a title to it. In such a state of the case, matters would be left as they are found, and neither law nor equity would interfere between the parties, as neither obviously has a claim upon the other. A consideration therefore is essential to make a promise binding. 2 B. C. 445.

But a consideration may consist of various things. I may promise, in consideration of value received in goods, or in work and labor, or other benefit conferred upon me by the promise. Then I am bound to

perform ; for 'tis not just that I should receive another's money or labor on the faith of my promise, and not perform it. Nay, more ; if by my promise I have brought detriment upon him, that detriment itself is full enough to bind me to fulfil that which I have engaged. And thus it is a settled point, not less of municipal, than of natural law, that to every promise there must be adequate consideration to make it binding : but yet that the consideration of loss to the promisee in case the promise is not fulfilled, is as available to support it, as the most valuable benefit derived to the party who promises, from him with whom he enters into the engagement. Of this, one of the simplest instances is a promise to pay the debt of another. If you promise a merchant that if he will trust me for goods, you will see him paid, and he advances goods accordingly, and I become insolvent, you will have to pay, although you have received no benefit. For you have undertaken for my solvency ; the merchant has parted with his goods on the faith of *your* promise, and it is just and fair, if there is to be a loss, that you should be the loser. And this is the settled law of the land as well as the dictate of equity, and the principle of natural law. See 6. Ran. 90.

It is sufficiently obvious that no express words are essential to constitute a promise, and *a fortiori* that no express *form* of words can be necessary. It is indeed true, that a promise is an assurance or engagement to do or not to do an act ; but it is very possible that that assurance or engagement may be contracted by my conduct as well as by my words. The foundation on which the obligation of a promise rests, is, the expectation and confidence I have knowingly, and voluntarily excited, either by my words or actions, upon the faith of which another confers on me a benefit or himself sustains a loss. If in the case just put, I tell the merchant in your presence, you will see him paid, your silence is an ac-

quiescence and as much a promise as if expressed in words. For he who stands by and sees another act upon the faith of his supposed assent without objection, is upon every principle of justice held to be responsible; and this is a doctrine whose ramifications penetrate through various branches of municipal law. If I have a mortgage, and stand by in silence while my debtor borrows further sums upon the security of the mortgaged subject, the last lender will be first paid, because my silence must either be construed into a fraud, or an assent to his priority. Although therefore, unquestionably, words either spoken or written are the best established declarations of our intents, and are therefore most appropriate to convey a promise, yet it is not less true that signs or other external marks or evidences may well suffice to convey our meaning, and to excite a confidence in our engagements, which will bind us to performance.

But this is not all. Promises may often be implied from the character of a transaction. If in the ordinary course of human transactions, I employ a workman to do a piece of work or take up goods from a tradesman, neither common sense nor common law demands, that I shall in so many words declare that I will pay him. That promise is implied from the nature of the transaction. And so if I assign you a bond: It is not necessary that I should say in so many words that I will pay it if you cannot recover it from the obligor, for that is implied in the very transfer unless the contrary is expressly agreed upon. So that upon the whole it is clear that although promises are best expressed by words, they yet may be implied or raised without them.

It must be confessed, however, that tacit promises, as they are sometimes called, are often implied by moralists on too slender grounds. Thus according to Mr. Paley, if I take a kinsman's child, and educate him for a liberal profession or in a manner suitable

ble only for the heir of a large fortune, it as much obliges me to place him in that profession, or to leave him such a fortune, as if I had given him a promise to do so under my hand and seal. In like manner, a great man, who encourages an indigent retainer; or a minister of state, who distinguishes and caresses at his levee, one who is in a situation to be obliged by his patronage, engages by such behavior, to provide for him. This is the foundation of *tacit promises*.

Surely nothing is more false than this. The benevolence to a kinsman's child is here made to create an obligation of the most perfect kind, and which if equal to a solemn bond may be enforced, whether I will or not, to the extent of giving him an ample fortune: And the kindness of a public minister is converted into a pledge to bestow the offices of the country, for the promotion of the fortunes of a protégé. Upon the principle which we have laid down, both positions are inadmissible, since neither of the instances presents the case of any consideration from which a promise could be implied. No advantage to the patron in either case is pretended, and in both the object of his kindness, so far from being *losers*, are only represented as the recipients of benefit, no just expectation being excited of any thing more than the benefactor may choose to give; and thus it is, that in the municipal law, no claim to compensation is recognized even for actual services, which are performed merely with an eye to gratuitous recompense. As where a service is performed in contemplation of a legacy, without request, though the party be disappointed he is without redress. 2 Str. 728. 5 John 534.

But though the obligation of promises is a well established principle both of the law of nature and of society, yet are there cases where according to the rules of neither, is a promise binding. Thus,

1. Promises are not binding where the perfor-

mance is *impossible*. This is obvious so far as respects the act itself; but the question still recurs whether he who makes the promise, is or is not bound to compensate the failure. Mr. Paley determines that he is, if he promised, with knowledge of the impossibility, *otherwise not*. Mr. Rutherford considers the promiser not bound at all.

Of this matter, I take a wholly different view. If the promise be made without consideration, indeed, it creates no obligation on the party as we have already shewn, whether performance be possible or not. But if the promise be made on valuable consideration to do what at the time of the promise is impossible, I apprehend the rule is clear that as the party cannot perform that for which the consideration is given, he must pay back that which he has received. If it were known by him to be impossible when he promised, then he has knowingly received the property of another for nothing, and is therefore bound in justice to restore it. And even if he did not know it, yet, as the thing for which my money was paid cannot be had, the consideration of that payment has failed, and it is but just it should be repaid.

If indeed, we could suppose a party to promise to go to Rome, or to build a rotunda like this, in a day, (without consideration) for the promisee we should see at once, that it was both frivolous and void. But if we suppose a man to advance £100 upon the consideration of a similar promise, I think we may safely affirm his right to recover back the money, which he has paid most obviously without consideration. Certain it is, that money paid for a consideration that cannot be performed, because it was utterly impossible to perform it, must be refunded. Thus where an action was brought on an agreement for the purchase of a horse at a cent a nail for every nail in the horse's shoes, and doubling on every nail, so that the price amounted to more than a million of dollars,

the purchaser was held to pay the real value. And where in consideration of £100., a man should promise to pay a cent the first day in the year, and so on doubling every day for the whole 365, though this would be wholly impossible since a solid globe of silver, larger than this dome, would scarcely pay it, yet he would be compelled to refund the sum which he received, nor would he be excused because his promise was impossible to be performed. 2 L. Ray. 1164. 1 Lev. 111. In like manner, if I give my bond for £100, with condition to go to Rome in 24 hours, the *bond* is good and the condition only futile, and I must therefore pay the money which, by my bond, I acknowledged to be due.

Nor are these but curious speculations. The principle is of daily use in application to contracts between man and man, not one of which could be determined equitably, if we follow the crude opinion of Mr. Rutherford. Vol. 1, 184. For if upon valuable consideration I promise that, which turns out to have been impossible at the time, although it is very certain I could never perform it, as it *is* impossible, yet I can very well compensate the failure by an equivalent. I may pay back what I have received, or make some other compensation. As if for £100, I contract that A. B. shall make a title to certain lands, and he is either dead or has no title, I am not absolved from liability, though I know it not. I have got another man's money on the faith of my promising him a title to the land; and if I fail, I surely cannot equitably keep back the price. So in the cases put by Mr. Paley.—“A father, in settling marriage articles, promises to leave his daughter an estate, which he knows to be entailed upon the heir male of his family—a merchant promises a ship, or share of a ship, which he is secretly advised is lost at sea—an incumbent promises to resign a living, being previously assured that his resignation will not be accepted by the bishop. The promiser,

in these cases, says Mr. Paley, with knowledge of the impossibility, is justly answerable in an equivalent ; but otherwise not."

Now, can there be a doubt that if he received in these several cases no consideration for his promise, he is in no wise liable whether he knew the fact or not ; but if he did receive value for his promises, he must refund or make compensation on failure to perform, even though his promise had been made with the purest faith and without a doubt of his power to perform.

Where indeed the promise is to do that which is possible at the time, but which becomes impossible afterwards before the time of performance by the act of God, the promiser is indeed excused, and in many cases, he will not be compelled to make a retribution, as if I hire a horse and promise to re-deliver him by a given day, and he dies of disease without default in me, I am altogether excused. It is the act of God. Yet though I cannot accomplish all, I may be bound to fulfil what I have engaged to do, to the utmost *extent of my ability*. As, if for the price of £100, I contract to convey an acre of land by a given day, and before the day one half is washed away. I still must make a title to the other. So if I bind myself to make a lease for years to A. B. and he assigns by a given day, and he dies before the time, I must make it to his executors ; for though I am absolved from strict performance by the act of God, yet is there no reason why I should not perform as nearly as I can. *Chapman vs. Dalton*, Plow. 284. Nay, more, if I promise to do for a valuable consideration what is possible at the time, but becomes impossible before the time of performance by the act of God or of the law, I am in general bound to refund the consideration though, I am released from the promise. As if a merchant for the consideration of £100, promises to ship to Jamaica 50 barrels of flour by a given day, and is

prevented by an embargo. The promise is discharged; but he must pay back the money. So, if for a consideration paid, I promise to plough a field which is washed away by a flood, the promise is discharged, but the money must be repaid. So, if for a consideration paid, I promise to repair a house and it is burnt by lightning, the promise is absolved, but the consideration must be repaid, for in all these cases the effect is to dissolve or rescind the contract, in which case the *status quo ante* should be restored, and the consideration returned, which was given only for the expected performance of that, which the act of God or of the law has rendered impossible. The case of alternative promises is considered hereafter.

2. Promises are not binding when the performance would be unlawful: yet this principle is subject to some modifications and distinctions which makes a further explanation of it necessary.

The performance of a promise may be unlawful in the sense that it is *criminal*; but it may be also said to be unlawful because not *permissible* by law. As for instance, the promise to commit murder or to smuggle goods is of the first kind: for both these acts are criminal. But a promise to settle lands in Virginia in tail or to create a perpetuity, are unlawful in the second sense only: that is to say, the promise is to do an act or settle an estate, in a mode not permitted by the law, so that the performance is in fact impossible.

Now it will seem sufficiently obvious, that upon principles of natural right, independent of the provisions of positive law, no promise to commit a crime can bind. I cannot have a *right* to do *wrong*, for it is a contradiction in terms. And *pari ratione*, I can have no right to *promise* to do wrong. But if I have no *right* to promise, the act of promising is not *valid* and of course is *void*. Promises therefore to commit a crime create no obligation.—They are absolutely void.

Paley puts the matter very forcibly thus : “ where the unlawfulness is known to the parties, at the time of making the promise ; as where an assassin promises his employer to dispatch his rival or enemy ; a servant to betray his master ; a pimp to procure a mistress ; or a *friend* to give his assistance in a scheme of seduction, the parties in these cases are not obliged to perform what the promise requires, *because they were under a prior obligation to the contrary*. From which prior obligation, what is there to discharge them ? their promise—their own act and deed—but an obligation, from which a man can discharge himself, by his own act, is no obligation at all. The guilt therefore of such promises lies in the making, not in the breaking them ; and if, in the interval betwixt the promise and the performance, a man so far recover his reflection, as to repent of his engagements, he ought certainly to break through them.”

Acts which are criminal, however, are of two distinct characters. They are designated in law by the Latin phrases, *mala prohibita* and *mala in se*. *Mala in se* are those offences which are forbidden by the pure and immutable laws of nature and of God : such as murder, theft, perjury, and the like. *Mala prohibita* are those offences which, though they be not *mala in se* or contrary to the law of God and nature, are yet offences against the law of the land, either as being repugnant to the welfare of the commonwealth or to some positive statute of the law making power. Both, however, stand upon the same foundation with respect to promises, for a promise to commit a *malum prohibitum* is not less void than an undertaking to commit a *malum in se*. The law will not look with any grains of allowance upon either.

It is worthy of remark, however, while treating of this part of the subject, how ingeniously the rules of law are constructed for the purpose of discouraging

the entering into criminal engagements. Thus if I promise A. B. £20 to kill a man, and he kills him accordingly, yet he cannot compel me to pay the twenty pounds. They are the wages of iniquity: and if once it be understood that the villain cannot recover the price of his offence, there will be less temptation to its commission. On the other hand, if I give a bravo £20 to kill another, and he does not do it, I cannot recover back the money I have paid, for my act was villainous and his promise void. Moreover, if it be understood that the assassin is not compellable either to commit the felony or to refund, the temptation to commit it is removed on the one hand from him, while on the other the risk of losing the money without attaining the object, is calculated to have no little influence on his employer. The same principles will be found to pervade the law of obligations, conveyances and conditions, where the transaction has its foundations in a criminal object, as we shall have occasion to shew in treating of those interesting topics of municipal law. Nor is the case at all different where a *bond* is given with condition to commit a murder or to pay £20. For if on failure to perform the first, the obligor be liable to the second, he would have that temptation to the crime which the law desires to remove. The bond in this case, therefore, is void as much as if the condition was single. 5 Leigh, 191.

As to promises to do what at the time of the promise is not *permissible* by law as to settle lands in tail in Virginia, or to deliver one in execution who has been once discharged, or to create a perpetuity, the promise is void, because it is legally impossible;—the engagement or contract is rescinded, the parties are remitted to the *status quo ante*, and the consideration paid, if any, must be refunded. *But* if the condition in such case be in the alternative, that is, to do the impossible thing, *or pay a sum of money*, then the obligor must pay the money; for having

promised to do one of two things, one of which was impossible when he promised, he is in justice bound to do the other. Thus in *Goodman vs. Chase*, 1 Barn. and Ald. 297. A man was in execution for debt, and Chase promised, if the plaintiff would let him go at large for a week, he, Chase, would return him into execution at the end of that time *or pay the debt*. The first was impossible, because it is a principle of law, that if a man is once discharged out of execution, he can never be returned into execution for the same debt. Chase was adjudged therefore to perform the alternative and pay the money. See *Noyes vs. Cooper*. 5 Leigh, 186.

But suppose the promise is to do one of two things, both lawful at the time, but one of which afterwards becomes unlawful or impossible by the act of God. Is the promiser bound to perform the other? It was said in *Laughter's case* 5 Co. 21, that as the party has his election to do either, and the act of the law or of God, had taken away this election, the performance was excused. But in other cases it is said, that the rule in *Laughter's case* must not be taken so largely. As where the promise was to make a lease for life to A, or pay £100. A died before a lease was made, yet the promise to pay the £100 was held binding. So if for £100 paid me, I promise to repair a house or repay the £100; if the house is burnt by lightning so that the repair is prevented, I must still repay the money, for the consideration money should not be lost to the party paying it. 1 Ld. Ray. 279. *Laughter's case* itself, indeed, would not be held to be law at this day. It has frequently been the subject of animadversion, and though often cited, no other case has been decided on its principles. It is stated fully by Mr. Evans in his valuable edition of *Pothier's Law of Obligations*, (2 Pothier, 46,) in which work we find a complete recognition by the civil law of the principle of alternative obligations as stated by myself.

"When several things, (says that author) are due under an alternative, the extinction of one does not extinguish the obligation ; if one *happens to perish*, that which remains is the only thing which continues due, and consequently the only thing which can be paid." 1 Pothier, 123, citing the Institutes, lib. 2, § 3.

The law of promises, however, as settled by the learned and astute sages both of the common and civil law, does not seem to correspond with the views of the eminent writers on the natural law so often quoted. Thus, as we have seen, Mr. Rutherford considers the promiser of what is impossible as not bound at all ; and as to promises which are lawful when made, but are afterwards declared to be unlawful, Mr. Paley remarks, that "in these cases it must be presumed that the parties acted upon the lawfulness of the promise at the time, and that the promise proceeded entirely upon that supposition. The lawfulness therefore becomes a condition of the promise : and where the condition fails, the obligation ceases. Of the same nature was Herod's promise to his daughter-in-law, "that he would give her whatever she asked, even to the half of his kingdom." The promise was not unlawful, in the terms in which Herod delivered it ; and when it became so by the daughter's choice, by her demanding "John the Baptist's head," Herod was discharged from the obligation of it, for the reason now laid down, as well as for that given in the last paragraph."

In neither of these cases is the solution given the true solution. Where the promise is lawful, as in the case already stated, of a merchant who engages to send a ship-load of corn abroad, and the exportation is afterwards prohibited by embargo, the act of the sovereign power excuses the non-performance indeed, but it does not relieve the promiser from all obligations, for if the promise was made on valuable consideration, that consideration must be refunded,

if it had been actually paid. And as to the case of John the Baptist, it comes rather under the influence of a former rule of Mr. Paley's, that a promise is not to be interpreted in a different sense from that in which the promiser had a right to suppose the promisee received it. Now Herod had *no right* to suppose his daughter would ask the commission of so foul a crime, nor could any fair interpretation of the promise give to it so forced and unnatural a meaning. Herod, therefore, was not, as Mr. Paley says, *discharged* from the obligation to give John the Baptist's head, for he never *promised* to give it; nor yet was he discharged from his promise, for though it did not *extend* so far as to bind him to commit a murder, yet so far as it did extend, it was not discharged. The daughter might have asked any thing else and been entitled to receive it.

LECTURES

ON

GOVERNMENT,

By HENRY ST. GEORGE TUCKER,

Professor of Law, in the University of Virginia.

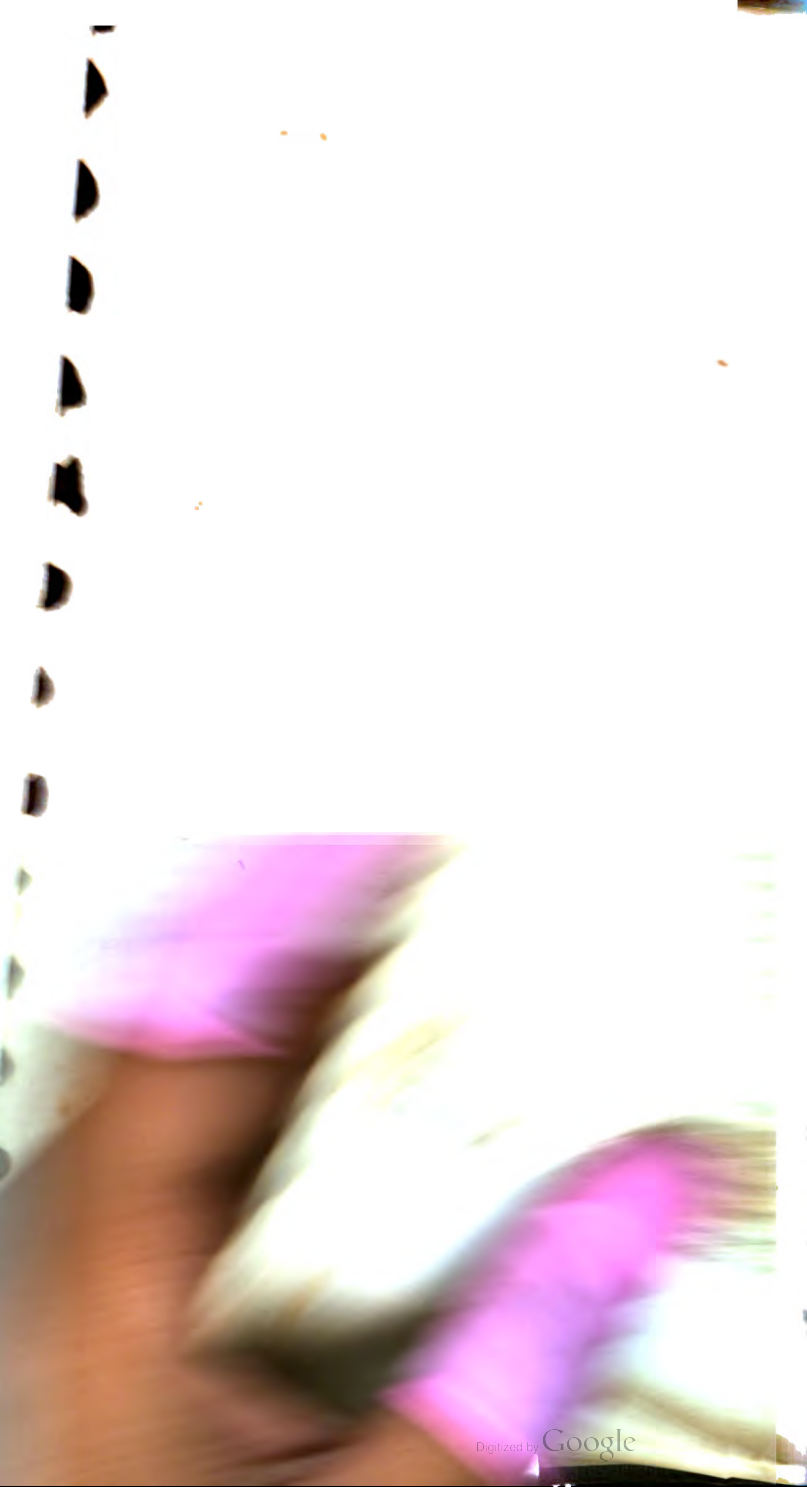
CHARLOTTESVILLE,
Published by James Alexander.
1844.

LECTURES ON GOVERNMENT, AND CONSTITUTIONAL LAW.

LECTURE I.

In entering upon the course of lectures on government and constitutional law which has been prescribed as one of the duties of this professorship, I feel the most unfeigned distrust of my own ability to fulfil the task with advantage to those, whom it is always my pleasure to address. I should therefore, without hesitation, have adopted the work of some other author upon the subject, if one had presented itself that seemed to me in any degree adequate to our purposes. I have not been so fortunate however as to meet with any, to which some serious objection did not lie; many of the essays upon the subject of government within our reach, being from the pens of British writers enamoured with their own system, and bigoted in their antipathy to every other; while on the other hand those which are imbued with the spirit of liberty, are too speculative and theoretical, or have issued from the American press during the throes of the French Revolution, and have been tinged by that violence of political feeling to which it so eminently gave rise. Others, indeed, of our own writers, have been unhe-

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individual, who associates himself with
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that is, he proposes to himself the advantage
protected against such injuries, as he might
on exposed to, if he had continued in a state
are. On the other hand, the body politic, to
he joins himself, that is, the other individuals,
which he associates, expect in return, that, as
is protected by them, he shall agree with them in
whatever is necessary or conducive to their common
enefit.

“ Now as these are the known purposes, which the
body and each of its members have respectively in
view, in associating with one another ; the very act
of associating, though there should be no express
relation between them, implies, that the society,
sidered as a body, agrees to the terms, upon which

sitately charged with as devoted an admiration of the British government, as the most faithful British subject; nor would the charge seem to be without foundation, in relation to him, who pronounced it to be the "most stupendous monument of human invention." This war of political pamphleteering, it must be confessed, is not the best calculated to elicit political wisdom. It is perhaps more likely to be attained, in the calm shades of academic retirement, where philosophy takes the place of passion, and our principles are traced up to the pure fountains of truth, instead of being drawn from the foul and turbid stream of party collision. In the views which I shall venture to present to you, I shall therefore avail myself of light wherever it may be found; and shall gather here and there from all the labourers in this interesting field, whatever of their productions may seem worthy of our acceptance: conscious as I am that I shall thereby more successfully promote your advantage, than by relying solely on my own more limited resources.

In the commencement of our course, I had occasion to remark that "the natural state of man has ever been and ever must be a state of society;" rude indeed, if you please, and confined to the narrowest limits, but still coeval with created man. Take the holy scriptures for our guide, and the fact is proved at once. Reject them and give the reins to reason, and whither will our unbridled fancies run? Do they point to an eternity behind us? Our mental eye will never penetrate the mists that hang around it. The keenest vision reaches not beyond a date, far, far within the period when countless millions mingled in society. It is the bible only that tells of the time "when man was found alone," when even woman was not found to keep him company. But yet if we reject that record of his early history, our conclusions still must be the same. Whenever man *was* first created, *if* there was a beginning to our

race, the state of things presented by the sacred writings must have had existence. If, as some sceptics (the Elian sect, I think,) have imagined, the world itself has been eternal, and the race of man without original, then *society* always has existed; and it can only have existed upon the principles which we are about to shew are essential to its structure and constitution. The subject is indeed altogether speculative but not without interest or instruction, and I beg leave to introduce it by a few remarks of a celebrated writer on the nature, the objects and origin of civil society.

“A civil society, or, as we usually call it, a state, has already been defined to be a complete assembly of men of free condition, who are united together for the purposes of maintaining their rights, and of advancing a common good. These two purposes, which civil society has in view, point out to us the mutual claims of such society and of its several members.

“Each individual, who associates himself with others, so as to form with them one civil society or body politic, does it with a view of obtaining their assistance in the maintenance and support of his rights; that is, he proposes to himself the advantage of being protected against such injuries, as he might have been exposed to, if he had continued in a state of nature. On the other hand, the body politic, to which he joins himself, that is, the other individuals, with which he associates, expect in return, that, as he is protected by them, he shall agree with them in whatever is necessary or conducive to their common benefit.

“Now as these are the known purposes, which the body and each of its members have respectively in view, in associating with one another; the very act of associating, though there should be no express stipulation between them, implies, that the society, considered as a body, agrees to the terms, upon which

each individual joins himself to it ; and that each individual agrees to the terms, upon which the society admits him as a member. And thus the society obliges itself to protect its several members ; and each member obliges himself to pay allegiance to the society, that is, to conform himself to whatever such society shall judge to be for the common good.

“ What has been already shewn, in the former part of this work, concerning the natural rights of mankind considered as individuals, will serve to teach us by what means civil societies must be formed, in order to make them consistent with those natural rights. Every man has naturally a right to think and to act for himself. The law of nature has indeed restrained him from doing what is unjust, and has subjected him to proper checks to prevent him from causelessly hurting others, and to proper punishment, if he does causelessly hurt them : it has obliged him likewise to advance the happiness of mankind, as he has ability and opportunity ; but then it leaves him to judge and determine for himself in what instances he can conveniently advance their good, and to choose for himself the means of doing it. When he becomes a member of a civil society, the public or body politic claims a right of pointing out to him what is just and what is unjust, and of directing him likewise what good he is to do, and in what manner he is to do it. There is no way of making such a claim as this consistent with his natural right of thinking and choosing for himself ; unless by his own consent, either express or tacit, he has waived this right and has voluntarily agreed to be so guided and directed. Every man has naturally a right to make use of his own force, either for his own defence, when he is in danger of being injured, or to obtain reparation and to inflict punishment, when he has been injured. But the civil society, to which he is joined, claims a right to judge both upon what occasions any force is lawful, and what force is lawful

upon these occasions. And as it takes him and all its other members under the protection of the common force, and considers him as a part of the public ; it does not allow him to exert his own force, but in concert with the public, and requires him so to exert it, whenever it is wanted. Here again the claim of civil society, upon the individuals, that compose it, cannot be reconciled with the natural rights of mankind, unless each individual has, either by express or tacit, by explicit or implied consent, parted with such rights, and agreed, that, where the public force can defend or redress him, he will never make use of his own, but in such manner, as the public shall direct. Thus the liberty of individuals is abridged in a state of civil society : the community has such a claim upon them in respect both of the rules, which they are to follow, and of the manner in which they are to make use of their force, as the same men, that compose the society, would not have had, either several or jointly, if they had continued unassociated, or had remained in that state of equality, in which all mankind are naturally placed. And as it would be an injury to take any part of their natural liberty from them without their consent ; the consequence is, that civil societies could not be formed, consistently with natural justice, by any other means, than by the joint consent, either express or tacit, of those, who compose it.

“ Each individual, who thus consents to give up a part of his natural liberty, obtains however more than an equivalent for what he gives up. If he submits to be guided in his duty by the public understanding or general sense of the community, to which he joins himself ; those, who are near him, and with whom he has the most frequent intercourse, submit in return to be guided in the same manner. And as by this means he is less likely to transgress the duty, which he owes to others ; so he has good reason to expect, that others will be less likely to transgress

the duty, which they owe to him ; than if both they and he had continued in a state of natural independency. As he parts with his independent right of using his own force according to his own discretion either to defend or to redress himself, and gives the public a claim upon him to join his force with theirs, who are associated with him, whenever his assistance is wanted ; so in return he is assured of the protection of the community, and has the advantage of a stronger force, than his own, to defend and to redress him, when he has a reasonable occasion for it."

After explaining at some length how the first rudiments of society were paternal and patriarchal he proceeds to observe, " It is not necessary to suppose, that all civil societies were increased, till they became as large, as we now find them, by the constant addition of fresh descendants from the same original parent. As the sons of one common parent, and the families derived from those sons, who had consented to remain united together under the jurisdiction of such parent, as long as he lived, were at liberty after his death either to continue in a like union, or to separate from one another : so the sons of different families, and their descendants with them, in consequence of such a liberty as this, might join with one another and form larger bodies, which did not come originally from the same common stock. Such unions may frequently have been occasioned by the want of a settlement, or by the fear of unjust violence. The fear even of just punishment has undoubtedly sometimes increased the multitude in a society thus joined together : and Rome itself would have begun from smaller numbers than it did, if its founder had not opened an asylum to screen criminals from justice. Nay there is some reason to believe, that the first society which we read of, owed its original to such an occasion as this. The first city, that history makes mention of, was built by Cain. And if Cain does not shew what motive led

him to this undertaking, when he declares his apprehension, that every one, who found him, would kill him ; yet we may learn it with some degree of certainty from what Lamech is recorded to have said to his two wives. He did not chuse to be shut up with his brethren, but was desirous to live at large like the rest of mankind : and to encourage his wives not to fear, that the crime of their ancestor would be punished upon them, he clears himself from the guilt of it, and assures them that there was no danger in leaving their present way of life, and in trusting themselves abroad. This will be the most obvious meaning of what he says to Adah and Zillah, if we render the words, as they may be rendered—Have I slain a man to my wounding, and a young man to my hurt? If Cain shall be avenged seven-fold, truly Lamech seventy and seven-fold.

“The condition of mankind is at present something different from what it was formerly, when civil societies first began to establish themselves. Such societies are now established in almost all parts of the world, that are inhabited at all : they are no longer in their first rudiments, as they were whilst separate families were making attempts to settle themselves, and to collect a force sufficient to repel injuries, but are founded upon steady principles, and unite their several members together by firm and lasting ties. And yet even in the present circumstances of mankind, numberless individuals have an opportunity of setting themselves free from these ties in such a manner, as to be at liberty either to found new civil societies, or to unite themselves to such new societies, as others have begun.

“It will be necessary, for the better understanding this matter to consider by what means men naturally become members of any particular nation or civil society ; and by what means, after they are so become members they may be at liberty to separate themselves from it again. Civil societies in general are willing

to consider persons, who are born amongst them, as members of those societies where they are born. It is plain, that they are considered in this light, because if they were looked upon as aliens, till they have been formally admitted to be members, they would, like all other aliens, be incapable of inheriting immovable goods. But then this is matter of favor in the society: and persons so born seem to be naturally at liberty either to make use of this favor or to refuse it. There does not appear to be any natural reason why a child, though he is born of parents, who belong to any particular nation or civil society, and is born likewise within the territories of that nation, should be obliged, after he is come to years of discretion, to continue in it. Positive institutions may indeed have ordered it otherwise: but he appears to be naturally at liberty either to make himself a member of that society, if it will receive him, or to join himself to any other, or to begin a new one in any part of the world not yet inhabited. He may indeed part with this liberty, after he is capable of thinking and of acting for himself, either by express or by tacit consent. If any express stipulations for that purpose pass between him and the society, in which he was born, he makes himself a member of it, and is no more at liberty, after such stipulations, to leave this society, than he is to depart from any other contract, by which he has bound himself. But without any formal or express stipulations, he may unite himself effectually to the society, in which he is born, by tacit consent. After he is arrived at maturity of judgment, if he continues to make use of the protection of that society, and to pay it such allegiance, as it requires of its members; his conduct must necessarily be understood as an evidence on his part, that he is willing or consents to be a member of it, and on the part of the society, that it consents to receive him. Amongst other instances of tacit consent we may reckon his taking and holding such immovable goods, as are in the jurisdiction or general property of the society. As aliens cannot naturally

take and hold such goods ; it is plain, that the society by allowing a native to take and hold them considers or however is willing to consider, a native as a member. And whoever makes use of this favor declares by so doing that he is willing or consents, to be considered in the same light, in which the society considered him. And it may be worth the while to observe, that though he should afterwards relinquish his goods, or dispose of them by sale or by gift, he does not cease to owe allegiance to the society : because the jurisdiction of the society over him did not arise merely from the possession of such goods, but from his consent to be a member of it, of which consent his so taking and holding these goods was an evidence."

The ingenious author has, moreover, in another chapter presented his views of the principles which naturally govern in the formation of every society. I offer them to the student for his consideration.

"In every society, where all the members are equal, that is where one has no more authority than another, whatever is determined by the whole, or by the greater part is binding upon each of the members.

"There can be no question, whether the act of the whole is binding upon each of the members ; because each of the members is naturally bound by his own act ; and the act of the whole is only the joint act of each individual member. The chief doubt is, whether the majority can naturally by any joint act of theirs bind, not only themselves, but the whole society, even those, who are in the minority, and dissent from such act. This seems at first sight to be inconsistent with a well-known rule, that as all men are naturally equal, no person can be obliged by the act of another without his own consent. But it is to be remembered, that when a man joins himself to a society, which is formed or instituted for the sake of carrying on some certain purpose, he either expressly consents, or must, by thus joining

himself to such society, be understood tacitly to consent, that this purpose shall be carried on. He obliges himself therefore by his consent, either express or tacit, to whatever is necessary for carrying on this purpose in such a manner, as is consistent with reason and equity. Now there are but three ways, in which a number of persons can do business jointly : it must be managed, either according to the sentiments of the whole body, or according to those of the greater part, or according to those of the lesser part. In all matters of a doubtful nature, or of an uncertain event ; especially where the number of persons concerned is very great ; it is next to impossible for all of them to agree in the same sentiments. The purposes therefore, for which a society is formed, could not be carried on, if nothing less than the full agreement of all the members was sufficient to determine what was to be done, so as to bind each of them to concur in the same measure. But each member, when he joined himself to the society, consented, that this purpose should be carried on, and consequently consented to be bound in some reasonable and equitable manner ; though the whole society should not happen to agree. This then being the case ; the next question will be, whether it is more reasonable and more equitable, that the minority should be bound by the act of the majority, or the contrary ? The answer to this question is obvious. It is plainly most consistent with reason, that the sentiments of the majority should prevail and conclude the whole : because it is not so likely, that a greater number of men should be mistaken, when they concur in their judgment, as that a smaller number should be mistaken. And this is likewise most consistent with equity : because, in general, the greater number have a proportionably greater interest, that the purposes of the society should succeed well, and have more at stake, if those purposes should miscarry or be disappointed. This then be-

ing the most reasonable and most equitable way for a number of men to do business jointly, when they are not all agreed upon the same measures ; and each member of the society having originally consented, that the purposes, for which it was formed, should be carried on in the most reasonable and the most equitable manner ; it follows that each member has consented to have the business of the society done according to the opinion of the majority ; where there is not an unanimous agreement of the whole.

“ From hence it appears, that, although no person can naturally be obliged but by his own consent, yet each person, who votes with the minority, is obliged by the act of the majority. He does not indeed give an explicit consent to such act at the time of voting : but there was a prior consent, from whence this obligation arises : when he became a member of the society, he consented, either expressly or tacitly, that he would in all instances conform himself to what should be the sense of the greater part of that society, to which he joins himself, so as to become a member of it.

“ Where the members of a society are equally divided in their opinions upon any point ; there is no more weight of reason or of equity on one side than there is on the other. No business therefore can be done : and consequently all things must, upon such an equality of votes, continue in the same state, that they were in before, without having any change made in them. For this reason, says Grotius, where judges are equally divided in their opinions, as to acquitting or condemning a criminal, such criminal is acquitted. And in like manner, where they are equally divided upon a question of property, the possessor keeps the thing in dispute.”

“ But though naturally the business of the society must stop, where the society is equally divided in opinion ; yet by mutual agreement this case may be provided for several ways. Some one member of

the society either by express agreement, or by custom, which is a tacit agreement, may have a casting voice. Or the business, when, for want of a majority, it cannot be done by the whole society, may by positive institution devolve to some particular members of it: and where such institution gives these select members this power, their act, or, if it is so appointed, the act of the majority of them, becomes binding upon the whole: because each person, when he consents to be a member of the society, is understood to agree to all the rules or institutions of it. In some lesser societies a farther provision is sometimes made: when a majority cannot be procured within the society, the business devolves to some one or more persons, who are not members of it. And where such provision has been properly established, the determination of such person or persons is binding upon the society; not because such a provision is naturally incidental to a society; but because, when it has been made and established as a standing rule of the society, all, who become members of such society, if they do not consent to it expressly, are understood by the act of making themselves members to consent to it tacitly.

“From what has been already said the reader will easily understand, that the natural majority in a society, where no agreement has been made to the contrary, is a major part of the whole. A society may be divided into three or more parts of as many different opinions: and though there may be a greater number of one opinion, than of either of the other two; yet unless that greater number is a majority of the whole society, it is not such a majority, as will naturally, or without some particular agreement conclude the whole. If the members, who are of the other two opinions, when they are taken together, would make a majority of the whole society, neither the equity nor the reason is with the third party. The equity is not with them; because this

third party has not a greater interest at stake : and the reason is not with them ; because this party is not more likely to judge rightly, than the other two, which differ from it. But as this may be urged equally against any one of the three parties ; in such circumstances all business must stop ; unless some method has been contrived and particularly settled for carrying it on. Some of the methods already mentioned, by which the business of the society may be carried on, when there is an equality of votes, may be made use of here. Or it may have been particularly provided, either by express consent or by custom, that whatever is agreed upon by the greater number whether such greater number is a majority of the whole or not, shall be conclusive. And though it is not naturally incidental to a society to be determined by such a majority as this ; yet an express agreement for this purpose, or long custom, which is a tacit agreement, are natural means of obliging the members to be concluded by such a majority."

Having thus laid before the student some of the views of an intelligent writer, as to the formation of civil society, and as to the principles which naturally prevail in its establishment, I proceed to remark that the very existence of such an association, necessarily implies the establishment of rules for its direction and government. Anarchy, more horrible than the fancied state of nature, would inevitably ensue, if masses of men were collected together without the necessary regulations for the protection of their rights, for the security of the strong against the weak, and for the defence of the whole society against other and different associations. Having united for these purposes, they must be presumed to have designed to adopt, according to their views of what was best calculated to effect those objects, such regulations as on the one hand would ascertain, and on the other would protect, the rights and privileges of each individual. But this would next lead, by necessary consequence, to

the prescription of duties, the denunciation of penalties, and to other regulations growing out of the various relations in which the members of such a community would stand towards each other. These rules or regulations constitute laws, and thus it is obvious that law must be coeval with society itself, or immediately spring out of it. It is the bond which holds it together and without which it would soon be resolved into its original elements, after passing through the awful struggle to which its dissolution would give rise. Law therefore should be looked to as the guardian and protector, and not, as it is too often considered, as the scourge of society. But law without obedience is an empty show; without enforcement it is *brutum fulmen*. Its essential attribute is power, its capacity to bless is derived from its authority, and its only value consists in its energy, its vigor, and its supremacy. The sovereignty of the law is the fundamental maxim of every social state; it is the foundation stone of all society. Law is *our* only king. He who disobeys it is an enemy to his race and a traitor to himself; he who defies it, is a rebel against the power, which he himself has contributed to call into existence and to make supreme.

Hence it would seem that law implies government: or rather, government is law. It is the exercise of the power of the whole society in prescribing rules, commanding what is right and prohibiting what is wrong. It branches itself out indeed into several departments, which constitute altogether *but one whole*. The first and most commanding is that which *makes* the law; the next is that which *applies* it; the last, the power that *executes* it. The first is called the *legislative*, the second, the *judiciary*, the third the *executive*. And these are to be found in some form or other in every government upon earth; sometimes indeed united in the same hands, and constituting then an unbridled tyranny; and sometimes, distinctly separated into various departments, and diffusing

their blessings like the dew of heaven, upon the happy people who enjoy the good fortune of sitting under their benign and salutary influence. But even when united, they are distinct exertions of the sovereign power ; and when distributed into different branches they nevertheless are but parts of the supreme authority, constituting altogether but one great whole.

Such then, young gentlemen, I take to be the origin of government : and it would next be an object of amusing speculation, to trace, as far as recorded history and the annals of the human family will enable us, its progress from the earliest times, and its rudest forms, to the complicated systems of the present day. But the nature of our plan will not enable us to go into so extensive an examination, and I must accordingly content myself with some general suggestions as to the earlier forms in which the exercise of authority, or if you please, of the powers of government, has been displayed by our race. I shall scarcely be pardoned I fear for occupying our precious moments by these matters of vain speculation. I shall do so, I assure you, from no partiality of my own for such inquiries, but in deference to the duties which have been prescribed, to this chair, and doubtless so prescribed with a view to the manner in which the subject has been treated heretofore in the most celebrated schools.

If we look to the beginning of all things as exhibited in the scriptures, we see the first germ of the exercise of power on the one hand, and of the duty of obedience on the other, in the connubial state ; when the Lord said unto the woman, " thou shalt be subject to thy husband, and he shall rule over thee." Gen. ch. 3, v. 16. And it is certainly a matter worthy of remark, that in perfect conformity with this command, whatever changes have occurred in the government of the world, no serious or successful effort has ever been made to throw off this subjection, and to give to the gentler sex an equal influence with

man in the conduct of public affairs. The story of the Amazons is but a fable, and the rule of Semaramis and Dido, of Maria Theresa, and Catharine, of Elizabeth and Victoria, are but exceptions to the general rule of woman's subjection and of her unfitness to take part in political concerns. The reason of this distinction between the sexes is to be traced in their very natures, which fit them for different walks, in which each is calculated respectively to excel.

For contemplation he, and valor formed,
 For softness she and sweet attractive grace ;
His fair large front and eye sublime, declares
 Absolute rule ;
She as a veil, down to the slender waist
 Her golden tresses wears,
 * * in wanton ringlets waved,
 As the vine curls her tendrils, which implies
 Subjection.

It is however to the parental authority that we should look, I think, for the first exhibition of the principle of government. Notwithstanding what is said by Mr Rutherforth, I think it clear, that if society ever *had* a beginning, "parental authority and the order of domestic life," as Mr. Paley observes, "supplied the first foundations of civil government."* The condition of human infancy renders the authority of the parent indispensable on the one hand and the obedience of the child unhesitating on the other. Until maturity at least, this relation between them would naturally continue unimpaired. But the parent has *many* children, and a family thus would form a small community governed by the father as its head. Men were thus prepared for larger society by being placed from infancy under authority and control, and taught the duty of obedience and submission to the rules of their little communities. A family thus, as has been well said, contains the rudiments of an empire ! The authority of one over many and the disposition to govern, together with the habit of being governed,

* Paley 305. 1 Black. Com. 47, 48.

seems in this way incidental to the very *nature*, and coeval with the *existence* of the human species. It furnishes apparently the first steps, by which many extensive communities may have been created. The authority exercised by the parent in the infancy of the child, would naturally be retained, in no inconsiderable degree after his children had grown up and had formed families of their own. The obedience, of which they remembered not the beginning, sustained by the ties of filial affection, and strengthened by habitual confidence in that parental wisdom which had guided their early footsteps, would be generally considered as natural, and would scarcely, during the parent's life, be entirely or abruptly withdrawn. And if this be so, (as would seem most probable,) we have at once the elements of a large community under patriarchal government. Such is the government of an ancestor presiding over his adult descendants. Such was the authority, according to scriptural history, of the ancient patriarchs over their respective tribes. In the beautiful story of Joseph and his brethren, (all of whom, when they went down into Egypt to "buy corn for themselves and their little ones, that they might live and not die," were full grown men with families of children, and the elder not a little advanced in life,) we see the venerable Jacob still retaining, without question his authority and influence over the whole. *He* first projects the journey into Egypt, and commands them saying, "get you down into Egypt and buy for us corn from thence;" and through the whole of the affecting narrative, the aged patriarch is represented as retaining over his seed the rights of a parent, and speaking to his generation as one having authority. Now if this be a just representation of the state of society in the early ages of the world, when *men lived and flourished for centuries*, the head of a tribe must, long before he was gathered to his fathers, have acquired a numerous body of de-

[†]scendants, all recognizing his authority and subject to his commands. In the nine hundred years of Methuselah, there would have been forty-five generations, allowing 20 years to each, within which time his progeny might have reached to many thousands, after every allowance made for intermarriages among kindred : and though it is true the life of man was cut some centuries shorter after the deluge, yet the custom of patriarchal government which had commenced before, would be still continued, though the progeny of the patriarch, accumulating in his lifetime, would certainly have been less. Noah lived 350 years or 17 generations after the flood, and his sons and his sons' sons also lived for centuries, and they and their seed overspread the earth. Myriads may have sprung into existence even before his death, and his patriarchal government over the whole is not intimated to have been impaired, at least as far as it could extend itself.

The death of the ancestor might indeed, on the one hand, have a tendency to split up and divide the families of his descendants, but on the other, there would be the strongest motives for continuing their association, of which experience and habit had taught them the very great advantages.

“ Although the original progenitor therefore was the centre of the union to his posterity, yet it is not probable that the association would be immediately or altogether dissolved by his death. Connected by habits of intercourse and affection, and by some common rights, necessities and interests, they would consider themselves as allied to each other in a nearer degree than the rest of the species. Almost all would be sensible of an inclination to continue in the society in which they had been brought up ; and experiencing, as they soon would do, many inconveniences from the absence of that authority which their common ancestor exercised, especially in deciding their disputes, and directing their operations in matters in

which it was necessary to act in conjunction, they might be induced to supply his place by a formal choice of a successor, or rather might willingly, and almost imperceptibly transfer their obedience to some one of the family, who, by his age or his services, or the energy and vigor of his character, superior order of his abilities, or by the part he possessed in the direction of their affairs during the lifetime of the parent, had already taught them to respect his advice, or to attend to his commands; or lastly the prospect of these inconveniences might prompt the first ancestor to appoint a successor, and his posterity, from the same motive, united with an habitual deference to the ancestor's authority, might receive the appointment with submission. Here then we have a tribe or clan incorporated under one chief, and thus we have the germ of monarchy. Such communities might be increased by considerable numbers, and fulfil the purposes of civil union without any other or more regular convention, constitution, or form of government than what we have described. Every branch which was slipped off from the primitive stock, and removed to a distance from it, would in like manner, take root, and grow into a separate clan. Two or three of these clans were frequently, we may suppose, united into one. Marriage, conquest, mutual defence, common distress, or more accidental coalitions, might produce this effect.

“ A second source of personal authority, and which might easily extend, or sometimes supersede the patriarchal, is that which results from military arrangement. In wars, either of aggression or defence, manifest necessity would prompt those who fought on the same side to array themselves under one leader. And although their *leader* was advanced to this eminence for the purpose only, and during the operations of a single expedition, yet his authority would not always terminate with the reasons for which it was conferred. A warrior who had led forth his tribe

against their enemies with repeated success, would procure to himself, even in the deliberations of peace, a powerful and permanent influence. If this advantage were added to the authority of the patriarchal chief, or favored by any previous distinction of ancestry, it would be no difficult undertaking for the person who possessed it to obtain the almost absolute direction of the affairs of the community, especially if he was careful to associate to himself proper auxiliaries, and content to practice the obvious art of gratifying or removing those who opposed his pretensions; and here is another germ of monarchy."—Paley, 306, 307.

But though military enterprise might thus lay the foundations of a government, it was not, it would seem, the only operative principle, upon which authority has been founded and power obtained over man. The priesthood appears to have succeeded among the Jews to more than the influence of the patriarch, until at last the restless and dissatisfied nation, tired and not without reason, of the nature of their institutions, besought the Lord for a king, who was granted to their prayers as a punishment for their folly. Such indeed he was, and I shall have occasion elsewhere to recal to you the language of heaven through the lips of his prophet, as to the character of the scourge which they had sought for as a blessing.

But though Saul was the *first king of the Jews*, yet the kingly government seems long to have extensively prevailed over the realms of Asia, before *his* accession to the throne *of the people of God*. Besides the numerous petty kings (who combined to war against Gibeon in the days of Joshua) and the kings of the Midianites and Mesopotamia whose people "lay along in the valley, like grasshoppers for multitude," there were the kings of Syria and Assyria, whose imperial cities were Damascus and Babylon, and whose history was intimately connected with that of the Jewish people. But profane history which carries us back

many centuries before, affords abundant evidence of the earlier establishment of kingly governments elsewhere, while here and there we find the germ of other forms, in the institutions of commercial cities and insulated people. The first Assyrian empire, which terminated with the effeminate Sardanapalus, who fired his palace with his own hand and was consumed with his mistresses amidst its splendour, its luxuries and its perfumes, had existed more than a thousand years under a succession of powerful monarchs, *before king David ascended the throne of Israel*; and out of its ruins had been formed the empire of the Assyrians of Babylon and of Nineveh, and the empire of the Medes, some centuries before the days of Nebuchadnezzar the great king of *his* day. Egypt too had had her kings coeval with Abraham with Isaac and with Jacob; and Sesostris her greatest monarch was anterior, I think, to the days of Moses. Yet all these are recent when compared with the dynasties of China, which that singular people profess to trace back 100,000 years. The earth then has been for ages subjected to the dominion of a monarch, and it is only here and there, that we see man asserting the prerogative of self government in comparatively small and insignificant societies. The states of Greece upon the Ægean sea, although at one time following the example of the rest of mankind, in submitting to the dominion of a monarch, at length threw off despotic rule and established republican governments, though diversified into as many forms as there were commonwealths or cities. The archons of Athens who were elective officers were first appointed at an epoch anterior even to the reign of David king of Israel; while in two centuries afterwards, upon the borders of the Mediterranean and upon the shores of Africa, Carthage reared *her* head, and rose to wealth and power under institutions partaking very strongly of republican character. In 700 years from *her* foundation *she* sunk beneath the power of "Earth's great mistress, Rome;"

who after passing through 200 years of monarchical government, had herself built up a republic on the coast of Italy, which was destined to overrun the world and then to suffer in its turn the horrors of a ruthless despotism.

The history of the middle ages furnishes other instances of attempts to establish governments upon the principles of freedom. Florence, Genoa and Venice, all built up republics, which soon however degenerated into haughty aristocracies; while the larger states of Europe settled down with various modifications on the monarchical system which now prevails throughout that continent. Driven from that interesting and powerful quarter of the globe, the flag of freedom has been unfurled upon the shores of America, and our beloved country assumes to herself the glory of furnishing an asylum, to liberty within the bosom of our flourishing confederacy. It remains for us but to search out and to cultivate with care the genuine principles of well regulated liberty, that we may steer the vessel of state safe from the destructive breakers of monarchy on the one hand, and the no less fearful whirlpool of licentious and unbridled democracy on the other. These considerations give a deep and abiding interest to political enquiries which cannot fail to secure for them your earnest attention, and bespeaks also your utmost candor and impartiality. With these enquiries we shall proceed in some subsequent lectures, before we enter upon the examination of the organization and structure of our own forms of government.

LECTURE II.

EFFECT OF STRUCTURE OF SOCIETY ON NATURAL RIGHTS.

Before we enter upon an examination of the several forms of government, which we now see in the world, it may not be improper to consider the effect of the structure of society upon the rights of those who constitute it, whether it be regarded as arising out of actual compact, or consider it as only kept together from a sense of its necessity, upon those principles on which alone its original organization could have been justly bestowed.

And first let it be observed that the absolute rights of all men, or those which they derive from nature) are the same, and therefore equal. If inequality be ever found to have existence, it will be seen to spring from the institutions of society. I do not now bring in question the *propriety* of these distinctions. I only insist they cannot have place except in the artificial regulations of social life. Reason and the concessions even of the most zealous advocates for distinctions, equally sustain the position of the *natural* equality of man. Upon what foundation in reason can a difference rest? Two children are born at the same time with the same appetites, the same wants, the same weakness, the same necessities. They grow up with the same rights of self defence, the same right to acquire the means of sustenance, and the same right of providing for their comfort and happiness. If one has superior right to the other which is it? What gives superior right? Is it strength? Can force give right? If it can, the labourer is superior to the lord. Is it beauty? If so, the mistress may be found inferior to the maid. Is it wit and intelligence? If so, the clown

is oft superior to the noble. There is no foundation then in nature for inequality of rights. That inequality, where it does exist, has its foundation in the artificial regulations of society. And thus it is, that even the courtly commentator remarks, that the members who compose civil society were naturally equal, and the "absolute rights which are vested in *all* by the immutable laws of nature" are the principal aim of the protection of society." Mr. Rutherford too, (no little stickler for strong governments) admits, as a well known principle, that all men are by nature equal; and our forefathers, on the most important occasion which has ever occurred since the settlement of this continent by the Europeans, set forth in their memorable declaration of independence, the solemn truth "that all men are created equal; that they are endowed by their creator with certain unalienable rights, among which are life, liberty, and the pursuit of happiness;" a truth which with us is no longer held to be debateable, but is placed among the aphorisms of politics, upon the footing of those axioms, which serve as the firm foundation of mathematical science. Thus it is that we find it at the head of our Virginia Bill of rights in the following emphatic terms; "That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society they cannot by any compact divest their posterity; namely, the enjoyment of life and liberty with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."

Next let it be remarked that the great end and aim and indeed the only legitimate object of the formation of society is as we have seen, the security and protection of its members in the enjoyment of their natural rights and in the promotion of their welfare and happiness. As Mr. Blackstone well observes, Vol. I, 124, "the principal aim of society is to protect individuals in the enjoyment of those absolute

rights which were vested in them by the immutable laws of nature ; but which could not be preserved in peace, without that mutual assistance and intercourse, which is gained by the institution, of friendly and social communities. Hence it follows that the *primary* end of human laws, is to maintain and regulate these absolute rights of individuals : and therefore the principal *view* of human laws is, or ought always to be, to explain, protect and enforce such rights as are absolute, which in themselves are few and simple." And this must be considered equally the case, whether we adopt the inadmissible position that mankind ever lived in a state of nature, and from running wild, all at once entered, with well developed reflection, into the complicated agreement which constitutes society ; or look upon society itself as "aboriginal" and coeval with man. In either case the end and aim is just the same. The motive for the *formation* of society, and the motive which *holds it together* are identical. The happiness and protection of its *members individually* is the *end and aim of every individual*. It is the end and aim of the *creation of the state*. The state is *constituted* for individuals ; to enable them to be all they ought to be, and to attain to all that happiness and perfection, of which their nature is susceptible. On the other hand the state is worthy of the sacrifice of life, of property, of every enjoyment and of every comfort ; for it is the shield and protection of individual rights, and is formed upon the pledge of all that we have and all that we are, for its maintenance and support. Thus it is founded upon reciprocity of obligation between itself and its members, and if either fails, that obligation is dissolved. If I break my engagement with *it*, I merit and receive its punishment ; and if on the other hand it treats me as merely *existing for it*, demanding every thing and giving nothing, the bond is broken and it cannot complain if I pursue my happiness in other

climes and connect my destiny with other institutions. It no longer exists *for me*. It is not *my state*.

Taking it then as true that the inherent, essential, absolute or primordial rights of all men (for by all these epithets have authors distinguished what are sometimes called our natural rights) are *the same*, and *therefore equal*, and considering that the *end* and *aim* of the institution of society was to *promote their protection and enjoyment*, it would seem to follow as a necessary consequence, that the equality, which would exist independent of society, cannot be disturbed by its formation. For supposing them equal, in their original, and supposing that there is an equal obligation on all upon associating together to maintain the rights of each, we cannot escape from the conclusion, that society cannot, consistently with the principles upon which it is founded, *create* an inequality in respect of natural rights among those who compose it. If bound to protect my rights, it is bound to protect my equality which is one of my rights.

But society we must remember is not organized government. Society comes first, government succeeds. Men first associate and finding government necessary, they constitute it by express action, or by tacit acquiescence in the exercise of power by one or more among themselves. Government, in fact would be an afterthought. Men did not originally congregate with a view to it, because they could not *a priori* be conscious of its necessity. But they came together by degrees and most probably formed their rude and simple governments by chance or tacit acquiescence. Were men indeed, with their present acquired knowledge, to be now thrown together, their first act would probably be to form a government suited to their necessities. But few governments in the world can trace their title to consent. Most have arisen from fraud or usurpation,

some from peculiar necessity, some from peculiar situation. Superior prowess or superior talent places the chief at the head of his tribe or clan in the hour of danger, and the sweets of power tempt him to make that *perpetual*, which was designed but for the necessities of the occasion. But our business being to enquire into the *legitimate* principles upon which society may organize government, we must treat the matter as though there was a voluntary association of individuals in the act of *forming* a regular government. In the exercise of this power each is entitled to the enjoyment of that equality of rights which existed between men in the supposed state of nature; though as we shall soon see, that equality may in some degree be disturbed by the structure of government. As to the right of the majority to govern, see 1 Story's Com. 299.

The remarks of Mr. Rutherford on this topic are so apposite and clear that they cannot fail to be acceptable.

“ When a number of persons who are equal to ~~one~~ another, that is, who are free, as all men naturally are free, from any jurisdiction or authority over one another, have united themselves into a civil society; the natural result of such an union is a legislative power. But then there is originally no legislative body distinct from the collective body of the society. All and each are obliged to conform themselves to whatever the whole or the major part shall agree upon: but as no one person, nor any select number of persons, can have any right to prescribe to the rest; so neither is this collective body of men naturally obliged to elect or settle a number of representatives, who shall have authority to act for them, or to determine what is to be done and what to be avoided. Each member of the society has originally a right to act for himself, as a member, that is, to deliberate with the rest, and to give his suffrage upon such points as come before them. It is necessary

therefore to look farther than the compact, by which men unite themselves into a civil society, in order to find out the origin of any other civil constitution of government, besides such an one as is popular or democratical in the fullest extent of that word.

“There is indeed an original legislative power in every civil society ; but some farther act is necessary, besides the mere union into such a society, before this power can be naturally vested in any one part of the society exclusive of the rest ; before a king, or the nobles, can have a right of making laws, which shall bind the whole ; or before the people shall be obliged to act by representatives, or to be concluded by the sense of any part of the society, instead of acting in the collective capacity, so as to be concluded by nothing less than the general sense of the collective body. All men, before they are considered as members of a civil society, are equal to one another, and are likewise independent of one another ; each has naturally a right to think and to act for himself. This independency is in some measure limited by their entering into civil society. If there is no express agreement, yet the very act of entering into such society is a tacit agreement, which makes them so far dependent upon the general sense and will of the whole body politic, that they are from thence obliged to conform themselves to that general sense and will. But if they are considered merely as members of a civil society ; if nothing more is supposed to have passed, besides that agreement, either express or tacit, by which they united themselves into such a society ; they would still have a civil equality : this union though it has produced a legislative power, has not lodged it in any particular hands ; it leaves each member as free to act for himself in a civil capacity, as he before was in a natural capacity. From hence then it follows, that the obligation of being subject to a legislative power in any one man, or in any body of men, though this body is

within the society, if it is different from the whole collective body, is a farther abridgment of natural liberty, than what arises merely from the agreement, by which mankind unite themselves into civil societies. But every abridgment of liberty, which is made without our consent, either express or implied, is contrary to the law of nature. No civil constitution of government therefore, which is not purely democratical, can be established consistently with the law of nature, without a farther agreement between those, who are members of the same civil society: we may indeed say, that without such an agreement no constitution of government, that we know of, or read of, could have been formed: because there does not appear ever to have been any constitution so entirely democratical, as to allow every member an equal suffrage in all matters of legislative power. In the most popular forms of government, persons of no fortune, women, and such as are in their civil minority, whether they are in their natural minority or not, are usually excluded from having any share in the exercise of the legislative power.

“There is no great difficulty in conceiving, that no single person can claim the legislative power in a civil society, in consequence of that compact only, by which the several members united themselves into one body, with a view of preserving their rights and of advancing a general good. An exclusive legislative power in a king must plainly be the effect of some farther compact. Nor is it more difficult to understand, that there cannot without such farther compact be any such thing, as an aristocratical constitution of government. There is not naturally in any civil society, merely as a civil society, any select and standing body of men with an exclusive legislative power. Whenever a power of this sort is lodged in such a legislative body, it must, in order to be consistent with the natural rights of mankind, have been lodged there by some other act, besides the or-

iginal agreement, upon which the society was formed. The necessity of supposing such a subsequent act is not so apparent in democratical constitutions. But yet it will, upon enquiry, be found necessary to suppose such a compact ; if we consider what constitutions are called democratical. In many constitutions, which are so called, the legislative power is vested in the representatives of the people, and is not exercised by the collective body. Here then we plainly find another compact besides that, which formed the society : at least we find an act of electing such a representative body and of delegating the legislative power to it : which act is different from the original compact, that joins the several individuals into one civil society." 2 Rutherford p. 81. 84.

Let us then see how far society composed of individuals having equal rights has power in the organization and structure of its government to break down that equality by creating unequal privileges among its members. Now, the very act of entering into society supposes the right in man to surrender some portion of his natural rights in return for benefits received. To this extent then it would seem that natural rights are alienable and may be subjected to restraint : for the natural right of acting without control, is certainly surrendered by submitting to the control of society. And so of many other rights. Consent then is sufficient to limit and control our rights, with some admitted exceptions, as the right to life and liberty ; and this consent it is which each man gives when society establishes government. Each consents to the act of formation however he may dissent from particular provisions. For having, by the act of association, bound himself to abide by the decision of the majority, he is bound by that decision though in conflict with his own peculiar views. No government could be formed or could exist on other principles, for in no community could unanimity of rule or action be expected, and if

no provision could be adopted except what was acceptable to every individual, nothing could ever be effected.

Now in the organization of government very many provisions may be legitimately adopted which however general and equal in their bearing, may nevertheless in their operation seem unequal and oppressive. Acting for the general good of all, society in the formation of government must so provide as that the agents invested with its authority may be competent to the discharge of the responsible duties committed to them. It must therefore in the selection of those agents require certain qualifications, and by this means some would be rendered incompetent while others would not be so. Yet this is no violation of equality of rights. It results only from inequality of condition, inequality of talent, inequality of moral qualities. This *inequality of condition* among men of unequal talent, unequal strength, unequal capacities of acquirement, is the natural consequence of *equality of rights*. To keep all men by forced regulations (agrarian laws and such like) in an equal condition would be to take away from the highly gifted, the vigorous, the prudent and the wise their natural right to enjoy these their natural advantages. Had they remained in a state of nature, their *conditions* would have been superior and it would be a violation of the legitimate principles of society to take away from them, that superiority. *Pari ratione*, it is evident that to preserve equality of rights it is not necessary that all should be equally elevated to responsible stations in society: for to put into office me who am unfit, equally with you who are fit for it, is to take away from *you* the advantage of *your* superiority, and to place me on a level with you without half your merit. If A can write and B cannot write, is it a violation of equality of rights that A may be a *clerk* but B shall not? If A be a skilful jurist and B an ignorant clown, is it

a violation of right that A may be elected Judge but B shall not? On the contrary would it not, grossly violate equality of right, to provide that those who are not qualified for office may *fill* it equally with those who are qualified? The truth is, society is to protect equality of rights by equality in *legislation*; by equal laws bearing equally upon every *class*; and by leaving open to all the *fair opportunity* of placing themselves on an equality of *condition*, as well as of *rights* with others. And if there be some who *cannot*, and others who *will not* place themselves on such equality, it is *their* fault or their misfortune, and not the wrong or injury of society.

But this is not all. The submission to the will of society in establishing such institutions as it may deem best calculated to promote the happiness of all, will bind its members to submit to that which is without question unequal, either because the inequality is otherwise compensated, or because the good of all demands it. Thus in the constitution of the United States we see the great states assenting to the unequal power in the Senate of the smaller states with a view to reconcile them to the federal union. But no one looks on this as a violation of the rights of the larger states, since it was the voluntary act of all the contracting parties. So the provision which excludes the female sex from the privilege of voting, of holding office, of mingling in the affairs of the state and of partaking those benefits which government scatters among the eager expectants of its favor, unquestionably trenches upon woman's natural rights; for as has been truly observed women, as well as men, have a natural right to their liberty, before they join themselves to civil society, and have, as well as men, a right to act as members of such society after they have so joined themselves to it. The consequence of which is, that till some act of the society, subsequent to its formation, has by general consent excluded woman from a right of suffrage, they might

naturally claim it. So, too with youth. The fundamental law which denies them the privileges of electing or being elected to office while under twenty one, though the burden of military service is cast upon them at eighteen, is an apparent violation of the principle of equality. But no one questions the validity of these or other principles, which have found their way into the structure of government, however unequal they may seem in their operation. Women therefore can no more complain of their exclusion from the polls or from public office than men can complain that women are exempted from militia duty, and are thus relieved from the exposure of their lives, and the innumerable hardships of a military campaign. See 2 Leiber, 253-4-5-6. See also 1 Story 396. *Minors* have still *less* reason to complain, since they but submit now to a privation which all others have suffered before them. Paupers have no reason to complain, that places are denied to them; for the right of society to choose its agents is complete, and it would be absurd to select those to manage *its* affairs, whose condition so conclusively proves their incapacity to manage *their own*. By parity of reason society has a right to prescribe in the fundamental law the qualification of a voter. If he is a felon shall he be permitted to mingle his polluted vote with those of freemen? If he is a beggar shall he be invested with the franchise of a citizen, which his necessities may prompt him to sell to the highest bidder? And is it a violation of natural right to refuse it? Is the inequality, an inequality of *right*, or an inequality of *condition*, for which he has no one to blame but himself? The latter assuredly, for as soon as he will remove that inequality, he is elevated to a level with those who exercise the suffrages of the country. However therefore I may have doubted the extent to which at one time the right of suffrage was limited, I never had a doubt of the legitimacy of the limitation. It is within the le-

itimate sphere of the powers of society, to institute these and many other distinctions in the arrangement of political rights and social duties. For though all have equal title to the natural rights of life, liberty and property, yet it is as impossible that there should be a perfect equality of *political* rights in any system of government, as that there should be an equality of *conditions*. For as nature herself has declared the latter to be impossible, since physical inequality of strength or of capacity must necessarily lead to inequality of acquisition, so the institutions of society declare the former to be impossible because women and children and other disqualified persons are unfitted to discharge the political duties which may be safely entrusted to others. The argument indeed may be cut short, by placing exclusion from political right upon the unquestionable right of exclusion from the body politic.

But though in a few very peculiar cases, it is legitimate in society to make distinctions which trench upon the great principle of equality of political rights, yet such distinctions should be rarely admitted ; as they are in their spirit subversive of the very object of the association. For all men were by nature free and equal. Neither had any pretension of superiority to another ; and even the child, born to day, of noble parents, derives from nature no higher privileges than the despised and destitute beggar's brat. His only claims rest upon the artificial regulations of society which in this respect violates its obligation to protect equally the rights of all, save when the safety or the advantage of the community shall otherwise require ; and this can never be truly affirmed of a distinction between infants in the cradle. If all men therefore were equal, and if on entering society the object was the maintenance of the rights of all, it never can be consistent with that object, to create inequality of rights and privileges among separate classes.

It is this outrage upon the rights of man which furnishes a just occasion for the censures of the just, and sooner or later will inevitably lead to resistance and rebellion by the oppressed.

LECTURE III.

OF THE SOVEREIGNTY AND OF THE CONSTITUTION OR FORM OF GOVERNMENT.

From what has been said in the preceding lecture I flatter myself it has sufficiently appeared that society was instituted on the one hand for the common benefit of all its members and on the other that every individual who entered into it must have been understood to submit himself to such regulations as should be ordained for the benefit of the whole community. This power of ordaining was of necessity in the society itself; for to its regulations submission was engaged. But this power of ordaining what others are bound to obey, is the power of making laws. For law is a rule of action prescribed by a competent power commanding what is right and prohibiting what is wrong. And the power which thus makes the law must be the supreme power in the state. For as I have elsewhere said it is of the essence of law to derive its force from a superior power: since if there be a power actually superior to that which declares the law, it is no law to that superior. In the first stages of society indeed, the body politic alone has no rival for that power. All men are supposed to have agreed to submit themselves to its law and the supreme power by conse-

quence is vested in it. The legislative power however could not conveniently be exercised by the great body of the community; and the first act of that body therefore would be, to ordain, constitute and appoint a portion of the society to exercise the duties of ordinary legislation and the various functions which it must have been at once foreseen were indispensable and yet could not be discharged by a mass. But this act of organizing an ordinary legislature, and distributing the different functions, which are rendered necessary by society, among various officers and departments, is the act of forming a constitution or form of government. And the act of forming the constitution, (which is to be a law to the lawgiver, a binding and obligatory rule for the government itself) is obviously an act of supreme and sovereign power. Nothing is above it! every thing is beneath it! nothing has legal existence but by its fiat! every thing is obliged to bend to its behests. What more is wanting to constitute supreme power?

Society then before it has organized government is supreme. After it is organized, has it parted with its supremacy? Is its sovereign power transferred to the creature of its will, or does it retain its supremacy notwithstanding it has vested the powers of ordinary legislation in a body appointed by itself? These are interesting questions which have long been the subject of controversy between the advocates of the different forms of government, but with us have ever been considered as settled in favor of the sovereignty of the people. By the second and the third articles of the bill of rights of Virginia it is declared "that all power is *vested in* and consequently derived *from the people*; that government is or ought to be instituted for their common benefit; and that when it is found inadequate to the great purposes of producing happiness and safety, a majority of the community hath an unalienable and indefeasible

right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal." Here then is a distinct assertion of sovereignty in the people ; of its continuation (notwithstanding the organization of government) and of the right to reform, to alter or abolish it, at their discretion. Whatever therefore may be the case elsewhere, government here has been established by the voluntary act of the people ; who have granted certain specified powers to their agents for its administration, which agents are responsible for the manner in which they may discharge the delegated trust. The government itself thus constituted is but the *agent*, indeed, of the society or people. It is invested with all its authority by *them*, and the instrument by which it has been called into existence, is the constitution of the state. That constitution is antecedent to the government, and the government is but its creature. It is no act of the *government*, itself, but it is an act of the *people*, in the organization and structure of the government. It is therefore not within the power of the government to alter it. They cannot change or abolish what was not the work of *their* hands, but the fiat of their *superior*. An attempt to do so is treason against those, to whom they owe their authority and being. If it could succeed, the government would be *felo de se*, for they would with their own hands have destroyed the vital principle of their own existence.

Hear what has been forcibly said by one of the luminaries of the bench of the Supreme Court, "What," says Judge Patterson, 2 Dall. 308 "is a constitution? It is the form of government, delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established. The constitution is certain and fixed: it contains the permanent *will of the people*, and is the *supreme law* of the land." In whom then is the sovereignty, if not in those, by whom the su-

preme law has been enacted ; a law to which the public authorities must bow, and which the people only can alter or repeal ; “for it is paramount to the power of the legislature, and can be revoked or altered, only by the authority that made it. The *life giving* principle, and the death doing stroke must proceed from the same hand. *What are legislatures ?* Creatures of the constitution ! They *derive their powers* from the constitution. It is their commission, and therefore all their acts must be conformable thereto, or they will be void. The *constitution* is the work or the will of the *people* themselves, in their *original*, SOVEREIGN and *unlimited* capacity. *Law* is the work of the *legislature*, in their *derivative* and *subordinate* capacity. The one is the work of the creator, the other of the creature. The constitution fixes limits to the exercise of legislative authority, and prescribes the orbit, within which it must move. In short, the constitution is the sun of the political system, around which all legislative, executive, and judicial bodies must revolve. Whatever may be the case in other countries, yet in this, there can be no doubt, that every act of the legislature repugnant to the constitution is absolutely void.”

Nothing can be more clear, or more forcible, than this beautiful exposition of the theory of constitutions, and of the principles of those governments, which have been established by *written* constitutions, in the United States of America. I might therefore consider myself as wholly absolved from the necessity of discussing the question, whether any legitimate form of government can have existence, upon any other principles ; yet I must beg leave to say, that my own convictions as to these fundamental truths rests not upon the authority of names however great, nor even upon the solemn declaration of rights of this ancient commonwealth ; but upon the plain and as I think incontrovertible principles of natural law. For we have already seen

that before government was established, *society*, that is the people, were confessedly supreme. See Rutherford and Blackstone, where before quoted. If then they were once the sovereign, the act by which they disrobed themselves of supreme power must be clearly shewn, or the power must remain where it was originally vested; even if we should admit, that it is within the *competency* of any people, to surrender irrevocably their liberties, and right of self government, into the hands of a master. Nay more, the act from which such surrender is inferred, must be distinct and unequivocal. It must admit of no other interpretation. For if it can be satisfied, by considering the establishment of a government as the mere creation of an *agent*,—to do that in limited assemblies which could not be accomplished by the mass,—upon every principle of fair construction the inference cannot be carried farther. Again; whatever may be the presumption of acquiescence, from the patient endurance of the people,—always more ready to suffer evils, while evils are tolerable, than to assert their rights at the expense of the peace and harmony of society,—yet such presumption is not reasonable where the ingenious mechanism of arbitrary power, sustained and enforced by standing armies, suppress the freedom of will, and stifle the groans of an oppressed and afflicted people. In such cases we can infer nothing from silence, we can draw no conclusion from the submission of the slave. “The waveless calm, the slumber of the dead,” affords but feeble evidence of contentment and satisfaction, of free acquiescence in things as they are, or of unnatural approbation of the indescribable horrors of an iron despotism. For the Turk or the bashaw have at least as much quiet in their dominions as Victoria or her predecessors have ever had in theirs; and if submission be evidence of assent, may challenge for their gloomy and unrelenting tyranny the approbation of unresisting slaves. Rome

was as quiet under the bloody Domitian from the dread of his ferocity, as in the palmy days of Titus from the admiration of his virtues; and the reign of the monster Nero was as little disturbed by open rebellion as the benign dominion of the illustrious Trajan, or the gentle rule of the peaceful Antoninus. And coming home to our own institutions we have in the slave states an instance before our eyes of the facility and the security too with which the organized power of a few may hold in the most abject subjection thousands of living beings until they lose the sense of degradation in the habits of servitude from generation to generation. Let it never be said then when we see man degraded and oppressed that he is contented and happy, because he is submissive and quiet.

Now it seems to be very generally admitted that no government which now exists, except those of our own country, was ever ordained and organized by a written constitution. "All the governments that now exist in the world" says Mr. McIntosh "except the United States, have been fortuitously formed. They are the produce of chance not the work of art. They have been altered, impaired, improved, and destroyed by accidental circumstances beyond the foresight or control of wisdom. * * * They cannot be supposed to derive their existence from the free consent of the people. * * * It is the great, and I had almost said the peculiar happiness of the people of the United States, that their constitutions respectively rest upon this foundation." "The origin of all governments," says the author of the rights of man, "may be comprehended under three heads, superstition, power, and the common rights of man. The first were governments of priestcraft, through the medium of oracles; the second, being founded in power the sword assumed the name of sceptre; the third is compact;" and of this our own governments were his examples. So much for

the views of the advocates of free government. The most devoted admirers of monarchy stickle for the same opinion. Thus Mr. Paley treats the idea of the social compact as false in fact, and refers to our own revolution as furnishing the nearest approach to it, of any of which history has preserved the account or memory." And Mr. Blackstone, the great champion of the British form of government, rests the institutions of the state, not upon original contract, which he says, has in no instance perhaps ever been formally expressed, but upon an *implied* contract which must always be understood from the very act of association.

If then, governments which now exist in the world, are not founded upon express compact, there can have been *no express* transfer from society, (or the people who constitute it) of that sovereignty which confessedly was originally vested in it. If it be transferred, that transfer can only be inferred from voluntary acquiescence, and we have already seen how little can justly be presumed from *it*. It can be scarcely necessary, farther to demonstrate this, by a reference to the gloomy despotisms of the Asiatic continent, or the absolute monarchies of civilized Europe. If in the comparatively free institutions of that country from which we sprung, it shall appear that no voluntary surrender of the sovereignty of the people can by any means be *implied*, if it shall appear that the institutions of England are the offspring of *force*, if we shall find occasional strugglings among her gallant people for centuries, to diminish the weight of their fetters, and to *reconquer* from their masters, a portion of their natural liberties, we shall have little reason to conclude, I think, that there has been a voluntary surrender of their rights by the people; notwithstanding their acquiescence in the system of government which grew out of usurpation and conquest, but which had been so far modified by their efforts, as to be now deemed less in-

tolerable than the throes of a revolution. Such is truly the state of facts. In the course of these lectures, I may possibly have occasion to treat of this matter more at large. At present it will suffice to remark that the government of England is distinctly in its original a government of force. Even before the invasion of the Normans, a monarchy of a very absolute character had existence, and though it is alleged that parliament existed, yet it is admitted that they were called together by the crown, and contained no infusion of the commons. The parliament was the *magnum concilium regis*, the *conventus magnatum vel procerum*, though it is said to have been sometimes called, *communitas regni Anglicæ*. 1 B. C. 148. But as there can be found no earlier traces of the summons of the commons to parliament than the reign of Henry III., in 1266, we may fairly infer, that previous to the conquest and for a long time after, the *magnates* only constituted this great council of the nation. The people, then, were subjugated, and held in slavery by the arbitrary power of kings and nobles. Be this as it may, the invasion of William the Conqueror was as complete a conquest as was ever recorded in the annals of the world. Mr. Blackstone indeed struggles hard to shew that this was not the case. But when we reflect upon indisputable facts in the history of that event, facts which are interwoven not only with the history, but with the civil polity of the nation, we cannot resist the force of this powerful evidence. Take but those facts which Mr. Blackstone's work itself has presented, and what must be your conclusion. He tells us, vol. 2, p. 45 in giving the constitution of the feudal system, that it had its original from the military policy of the northern conquerors, who brought it from their own countries, and continued it in their conquered colonies to secure their new acquisitions; to that end large districts were allotted by the conquering general to his officers, who

dealt them out again to their inferiors. Thus it is clear that they not only conquered the country but also seized upon the lands, and granted them out to their followers. This polity had been even introduced before the conquest, as he tells us, but was never received, (*at least not universally*, and as part of the national constitution) till the time of William the Norman, p. 48. Here then is a *negative*, *pregnant* with the *affirmative*, that in William's reign it *was universally received* as part of the national constitution. He tells us afterwards it was gradually established, by the Norman barons, *in such forfeited lands as they received from the gift of the conqueror*. "Certain it is" says he, "the Normans began to gain *very large possessions* in England;" no doubt by the distribution of these forfeited lands which the conqueror seized by right of conquest. It seems too that those whose possessions had not been wrested from them, saved them only by consenting to surrender them, and to take back a feudal gift with all the feudal consequences. In doing so they took the oath of fealty or fidelity, which, as the Commentator tells us, was a profession of faith to the *lord* by the *vassal*; besides which, *upon investiture*, he usually did homage to his lord; openly and *humbly kneeling*, and being ungirt and uncovered, and holding up his hands, both together between those of the lord, who sate before him; and there, professing, that he did become his *man*, from that day forth, of life and limb and earthly honor; and then he received a kiss from his lord." page 53. Add to this, that it became a fundamental maxim, and necessary principle, (though in reality says Mr. Blackstone a mere fiction) that the king is the universal lord, and original proprietor of all lands in his kingdom, and that no man can, or doth possess any part of it, but what has, either mediately or immediately, been derived as a *gift from him*, to be held upon feudal services; and that mind must be

strangely constituted which cannot see every feature of conquest in the transaction. In vain may Mr. Blackstone allege that this was but a fiction ; and that the English, whose estates were not seized as forfeited, were *persuaded* to enter into this arrangement. Were the *feudal burdens* but a *fiction* which were its inevitable consequence? Were the aids, and *primer seizins*, and wardships, and all the other vexatious appendages of feudal tenure, nothing but a fiction? (See 2 B. C. 76.) Were the rents or services *payable for their own lands*, nothing but a fiction? Was the degrading homage and the *military subserviency* it imposed nothing but a fiction? Was pure villenage nothing but a fiction? B. C. vol. 2, 93. Unhappily for them, it was a sad reality, under which they groaned through many an iron reign! And as to persuasion! What persuasion is that which is urged by "man and steel, the soldier and the sword?" It was the persuasion of stern necessity; reluctantly yielded to by a conquered people, and enforced by the sons of rapine, eager to reap the harvest of their prowess, and the reward of their *pseudo* chivalry.

There never was indeed a more complete and entire conquest than that of William and his barons. The most distinguished historian of the English monarchy, (see Mr. Hume's England, chapter 4,) places this matter beyond any reasonable doubt; and since I prepared what has been already said upon the subject, I have had the gratification of looking into the work of a French writer, whose intelligence and research leave no longer reason even for cavil. It is the history of the Norman conquest by M. Thierry, who sustains himself by references to Dooms-day book, and other sources of information, derived in a great degree from the early chronicles of England. From these it appears vol. 1, 326, that the subjugation of the kingdom was complete; that the lands and goods of all who had fallen in battle, or who

had borne arms against the conqueror and survived the defeat, or who had been delayed in repairing to the standard of their country, were seized and confiscated. The children of the former were declared to be disinherited; the surviving combatants were glad even to come off with their lives, and those who did not reach the battle, were despoiled, for *their intention of being there*. Nay more, every movement was made the foundation of new confiscations, until the greater part of the kingdom passed into the hands of the Normans. Those only who had tamely submitted escaped the general destiny, and even those were compelled to surrender their possessions to the crown or to a noble, and take them back upon condition of doing homage and fealty to their new and arbitrary masters. "*Tous les indigenes*," says Mr. Thierry, page 330, "*furent désarmés, et contraints de jurer obéissance et fidélité au nouveau chef, imposé par la lance et l'épée.*" The followers of the conqueror who had done homage to him for lands *which were yet to be conquered*, reserved those of the English who were dispossessed. The captains had vast domains, and castles and villages and entire towns. Peveril of the Peak, whose name has been revived in modern romance by the pen of Sir Walter Scott, (the hero of the *novel*, was of the time of Charles II. and in his day but little was left of these splendid possessions of his ancestor,) received for his share *fifty five manors* in the province, (or shire of Nottingham,) and in the town itself, 48 Merchant shops, 12 houses of men at arms and 8 belonging to the English farmers. From these examples we may learn the severity of that tyranny which followed the conquest, and the entire subjugation of the English people by their Norman invaders.

The inference which I would draw from this fact, in reference to the subject under examination, is, that the government of England did not originate in voluntary acquiescence on the part of the people and

that of consequence there was on their part no surrender or transfer of that sovereignty which we have seen originally belonged to them of right, and of which they could not be rightfully deprived without their assent.

I proceed next to observe, that the progress of things, in the English nation, as little justifies the notion of the *surrender* of the right of the people to alter, amend, or to change their civil polity, as the original establishment of the government itself. That was an usurpation, by which the rights of the people were wrested from their hands. The course of things ever since, has involved the assertion of the sovereignty of the people, and of their right to control the harsh and tyrannical action of their rulers. The first great measure of this description, to which I will refer you, is the charter which was extorted from the fears of King John; a monarch as dastard in spirit, as tyrannical in disposition. In that great charter were included provisions which placed certain definitive limits to the power of the crown, and protected the liberties of the subject, from the gross invasions which had been freely practiced under arbitrary rule. The next instance which may be given is the change of constitution which brought Charles the I. to the block, and placed Cromwell in the protectorate; and lastly the revolution of 1688, which deposed the last of the Stuarts, and placed king William on the throne of England. In all these acts we see the exertion of a power by the people in whole or in part, to control the conduct of those who held the reins of public authority, and even to amend, to alter and to change, what had been considered as firmly established for centuries.

Nor indeed do I understand these positions to be assailed except upon a ground which is altogether technical. See Paley, 324. I understand even Mr. Hume, vol. 2, 90, as admitting, and asserting the perpetual and unalienable right of the people, to in-

first upon the great objects for which society is founded, to wit, the equal distribution of justice, and the free and secure enjoyment of property ; rights, which he tells us, no time, nor precedent, nor statute, nor positive institution, ought to deter them from keeping ever uppermost in their thoughts and attention. And Mr. Blackstone, though he assumes unbounded power for parliament, and denies any *legal* rights, according to the British constitution, to alter or reform the government, except by its authority, yet he does not contest the *right of revolution* ; and this right of revolution is but the exercise of popular sovereignty, in correcting the mischiefs and modifying the forms of the existing government. In our future speculations, therefore, we shall take it as sufficiently established, that the sovereign power is to be regarded as of right in the great body of the people.

I may perhaps be considered as having devoted too much of our time to the establishment of the important principle of the sovereignty of the people. I have done so, however, first, because I conceive that principle to lie at the foundation of all our institutions. Secondly, because in the course of a pretty long life, I have had occasion very frequently to hear the sovereignty of the people sneered at, if not openly denied ; and thirdly, because the proof of its existence, its exercise, and the admission of it even by high toned British jurists, may (in the event of these crude thoughts ever being ushered into the world) have the effect of removing any doubt about the principle, in the minds of those who have entertained the high estimate of the British constitution which Mr. Adams has set upon it. On the other hand let me observe, that no one can be more opposed than myself, to the indiscriminate and habitual resort to the *exercise* of this sanatory power, except in the modes prescribed by the constitution. It is—or at least it should be the *ultima ratio*—resorted to only, where mischiefs are no longer to be borne. It is

the *medicine* of the constitution, and I would not have that medicine for my *daily bread*. We must not however conclude that the sovereignty is *always* in those hands in which it *ought to be*. Force or fraud, have, from the beginning of the world to the present day, been most successfully exerted in depriving man of his natural rights. When this is the case—where by usurpation the power *de facto* is in an absolute monarch, the *sovereignty* is indeed in his hands so long as his rule continues; though he holds and exercises it not by right but by wrong. For as I have said elsewhere, Tuck. Com. Book 1, p. 4, in commenting on a criticism of Judge Tucker upon a remark of Mr. Blackstone, “It is of the essence of law to derive its force from a superior power, for if there be a power actually superior to that which declares the law, it is no law to that superior. It is of no moment whether the power be *de jure* or not. If it be *de facto*, it possesses the power of enforcing obedience to its commands; and in this sense, it is strictly true, that sovereignty and legislature are convertible terms. Thus the parliament and king of Great Britain *de facto* hold the supreme power in that kingdom, according to the principles of their government, though the power *de jure* resides in the people. So the Russian autocrat holds *de facto* the sovereign power, and his ukase is a law to his subjects whether he exercises this sovereign and legislative power *de jure* or not. It does not follow, that those who have *right* on their side must be supreme, but that nothing can give law, which is not supreme, seems incontrovertible.” Nor are these views incompatible with the fact that the acts of our legislative body are binding on the citizens. It binds them as *individuals*, although they form a competent part of that mass, in which the sovereignty resides, and which is of course superior to the legislature itself. It binds them precisely on the same principle on which they would be bound, if the law

were enacted by the whole people in a primary assembly. Though forming a constituent part of that assembly, they would be bound individually by any law which it shall enact : and the legislature being its agent, its servant, its *locum tenens*, the laws, which it declares, are but the act of the whole body, and are obligatory therefore upon every member which composes it.

I cannot quit this subject, however, without again adverting to the passages referred to in Blackstone, and remarking, that the great difference between the exercise of the supreme and ultimate corrective power of the nation in the United States and Great Britain, is, that with us the alternation, amendment and change of our constitution and forms of government is mainly provided for by the fundamental law itself ; whereas in Great Britain those grievances for which there is no stated remedy or express legal provision, are only to be redressed by revolution ; for they are to be left " to the prudence of the times to provide new remedies upon new emergencies," and to exert *those inherent, though latent powers of society, which no climate, no time, no constitution, no contract, CAN EVER DESTROY OR DIMINISH.*" And herein may be discerned the very great advantages of our system of written constitutions ; since, under them, the most vital changes may be made when necessary, without any material agitation of the political body, whereas in England they can only be effected amid the throes of a revolution.

LECTURE IV.

THE GREAT OBJECTS OF GOVERNMENT AND POLITICAL INSTITUTIONS.

If I have been successful in establishing that the great object of the institution of society is the promotion of the security, the happiness, and the prosperity of those who compose it, it would seem to follow as a necessary consequence, that that is the best government, which is best calculated to promote these beneficent and salutary purposes. It unfortunately happens, however, that mankind have never been of one opinion on this important subject. Some are dazzled by the splendors of monarchy, others by the pride and noble bearing (as it seems to them) of a haughty aristocracy, while others have been enamoured with the charms of democratical government, in which the whole society exercise in person, the united powers of law makers, judges and executive. Monarchy, indeed, seems to have prevailed most universally, and the most powerful and vigorous understandings, and the most glowing and nervous eloquence have been employed in sustaining its supposed superiority above all other forms of government. To it are attributed "unity of council, activity, decision, secrecy, dispatch; the military strength and energy which result from these qualities; the exclusion of popular and aristocratical contentions; the preventing by a known rule of succession, of all competition for the supreme power, and thereby repressing the hopes, the intrigues, and the dangerous ambition of aspiring citizens." The beautiful yet extravagant eulogium of Mr. Burke on the monarchical form of government are in the me-

mony of all, and the more tempered encomiums of Mr. Blackstone on the British constitution are yet fresh in your recollections. We shall hereafter have occasion again to refer to these topics, and to examine not only the justice of their encomiums, but to enquire also whether most that is valuable in the boasted British constitution, is not derived from the large infusion of popular power, which the struggle of centuries has succeeded in introducing at length, into that complicated form of government. At present, however, let it be our business to come to some distinct understanding on the subject of the promotion of the general good, instead of indulging in mere generalities, which lead to no satisfactory conclusion.

1. And first let it be remarked, that as all who constitute the society or body politic, are upon a perfect equality as to rights, so far as that equality is unaffected by social institutions, and as all are supposed to have entered into society for the security of those rights, and the promotion of their happiness and prosperity, each surrendering an equal portion of the right of self government, and equally submitting himself to the regulations which may be made, it would seem to follow, as a necessary consequence, that the great object of political institutions, should be the good of the *whole*, and *not of a part only* of the people. If so, it is equally clear, that the good of *all* should be equally secured by the constitution or form of government; "that no man or set of men can be entitled to exclusive or separate emoluments or privileges; and that government is or ought to be instituted, for the common benefit, protection and security of the people, nation or community." These are the sublime truths promulgated by our bill of rights, and which are sustained and enforced by a recurrence to the fundamental principles, upon which alone legitimate governments can ever fairly rest.

2. From this view of the subject we must infer that in the establishment of the constitution of a state, the *greatest good* of the *great mass*; and not the greatest good of a *favoured class*, should be the governing principle. For if it were otherwise, we should break in upon that equality of *rights*, which has already been shewn to be founded in nature, and not impaired by association. God and nature made us equal; for according to the *Mosaic* account God made man in his own image, and all the descendants of the first man are made so likewise: so that there is no foundation in *religion* for the notion of inequality; and as to nature, she so often makes the poor child vigorous in body, and enlightened in mind, while the child of the noble is ricketty and a fool, that it is really inconceivable how the notion of a natural inequality of *classes*, ever should have found its way into human speculations.

3. It may not be improper, however, here to guard against an error which may grow out of a modified form in which the principle just announced is sometimes expressed. Thus we hear it occasionally remarked that the great object of government is the greatest good of the *greatest number*. If by this is merely meant, that the *general interests* of society are to be the objects of legislation, and not the interests of particular classes, the position is in perfect conformity with the principle I have announced. But if, as is much to be feared, 1 Story's Com. 299, it is understood to mean, that a *majority* is entitled to legislate for its own benefit, in utter disregard of the rights of the *minority*, then I think it may be safely affirmed to be an utter perversion of the legitimate principles of free government. For a *majority* may be a *faction* as well as a *minority*, and when it is so, is the more dangerous. However great the majority, if there is an invasion of the equal rights of the minority, it would lead to resistance and revolution, where the strength is sufficient,

and the wrongs are momentous enough, to justify such an appeal. For instance: In the state of Virginia, the trans-allegany country is in a minority. The country on this side of that mountain greatly preponderates in numbers, or at least in representation. Yet who would say, that to relieve themselves from the burden of taxation, they should throw the whole charges of the state upon their western brethren? But this would be to consult the greatest good of the greatest number; unless indeed it be said, as well it may, that in the long run, it would prove most mischievous even to themselves. So indeed it would: precisely because it always must be mischievous, even to the actors in iniquity themselves, to set at naught the immutable principles of justice and of right; to avail themselves of their power to oppress their brethren and to trample the rights of a minority under foot. Even handed justice would at some future day, return the contents of the poisoned chalice to their lips; and the precedent which they set, would sooner or later be brought to crush them by its weight. These important truths cannot be too earnestly impressed, young gentlemen, under a government in which the democratical principle has so decided a predominance as in ours. It is the weak side of our noble institutions, and it therefore requires to be particularly guarded by the wise and virtuous, and by all who love the principle of democracy. There is indeed more reason for circumspection in this regard, if it be true as has been said by one of the most acute observers of the present day that "no political form has hitherto been discovered which is equally favorable to the prosperity and the development of all the classes into which society is divided. *These classes continue to form, as it were, a certain number of distinct nations in the same nation*; and experience has shown that it is no less dangerous to place the fate of these classes exclusively in the hands of any one of them, than

it is to make one people the arbiter of the destiny of another. When the rich alone govern, the interest of the poor is always endangered ; and when the poor make the laws, that of the rich incurs very serious risks. The advantage of democracy does not consist, therefore, as has sometimes been asserted, in favoring the prosperity of all, but simply contributing to the well-being of the greatest possible number.

“ The men who are entrusted with the direction of public affairs in the United States, are frequently inferior, both in point of capacity and of morality, to those whom aristocratic institutions would raise to power. But their interest is identified and confounded with that of the majority of their fellow citizens. They may frequently be faithless, and frequently mistaken ; but they will never systematically adopt a line of conduct opposed to the will of the majority ; and it is impossible that they should give a dangerous and exclusive tendency to the government.

“ The mal-administration of a democratic magistrate is a mere isolated fact, which only occurs during the short period for which he is elected. Corruption and incapacity do not act as common interests, which may connect men permanently with one another. A corrupt or an incapable magistrate will not concert his measures with another magistrate, simply because that individual is as corrupt and as incapable as himself ; and these two men will never unite their endeavors to promote the corruption and inaptitude of their remote posterity. The ambition and the manœuvres of the one will serve, on the contrary, to unmask the other. The vices of a magistrate, in democratic states, are usually peculiar to his own person.

“ But under aristocratic governments public men are swayed by the interest of their order, which, if it is sometimes confounded with the interests of the

majority, is very frequently distinct from them. This interest is the common and lasting bond which unites them together ; it induces them to coalesce, and to combine their efforts in order to attain an end which does not always ensure the greatest happiness of the greatest number ; and it serves not only to connect the persons in authority, but to unite them to a considerable portion of the community, since a numerous body of citizens belongs to the aristocracy, without being invested with official functions. The aristocratic magistrate is therefore constantly supported by a portion of the community, as well as by the government of which he is a member.

“The common purpose which connects the interest of the magistrates in aristocracies, with that of a portion of their cotemporaries, identifies it with that of future generations ; their influence belongs to the future as much as to the present. The aristocratic magistrate is urged at the same time, towards the same point, by the passions of the community, by his own, and I may almost add, by those of his posterity. Is it, then, wonderful that he does not resist such repeated impulses ? And indeed aristocracies are often carried away by the spirit of their order without being corrupted by it : and they unconsciously fashion society to their own ends, and prepare it for their own descendants.

“The English aristocracy is perhaps the most liberal which ever existed, and no body of men has ever, uninterruptedly, furnished so many honorable and enlightened individuals to the government of a country. It cannot, however, escape observation, that in the legislation of England the good of the poor has been sacrificed to the advantage of the rich, and the rights of the majority to the privileges of the few. The consequence is, that England, at the present day, combines the extremes of fortune in the bosom of her society ; and her perils and calamities are almost equal to her power and her renown.

"In the United States, where the public officers have no interests to promote connected with their caste, the general and constant influence of the government is beneficial, although the individuals who conduct it are frequently unskilful and sometimes contemptible. There is indeed a secret tendency in democratic institutions to render the exertions of the citizens subservient to the prosperity of the community, notwithstanding their private vices and mistakes; whilst in aristocratic institutions there is a secret propensity, which, notwithstanding the talents and the virtue of those who conduct the government, leads them to contribute to the evils which oppress their fellow-creatures. In aristocratic governments public men may frequently do injuries which they do not intend; and in democratic states they produce advantages which they never thought of."

"I do not think," says the same writer,* "that it is possible to combine several principles in the same government, so as at the same time to maintain freedom, and really to oppose them to one another. The form of government which is usually termed *mixed* has always appeared to me to be a mere chimera. Accurately speaking there is no such thing as a mixed government, (with the meaning usually given to that word,) because in all communities some one principle of action may be discovered, which preponderates over the others. England in the last century, which has been more especially cited as an example of this form of government, was in point of fact an essentially aristocratic state, although it comprised very powerful elements of democracy: for the laws and customs of the country were such, that the aristocracy could not but preponderate in the end, and subject the direction of public affairs to its own will. The error arose from too much attention being paid to the actual struggle which was going on between the nobles

* De Tocqueville, p. 241.

and the people, without considering the probable issue of the contest, which was in reality the important point. When a community really has a mixed government, that is to say, when it is equally divided between two adverse principles, it must either pass through a revolution, or fall into complete dissolution.

"I am therefore of opinion that some one social power must always be made to predominate over the others ; but I think that liberty is endangered when this power is checked by no obstacles which may retard its course, and force it to moderate its own vehemence."

If these speculations are correct, they furnish obviously the strongest motive to every lover of the democracy, for the cultivation of that spirit of justice, forbearance, and moderation on the part of the majority, which, constitutes the most essential virtue in all popular forms of government. "Virtue," says Montesquieu, is the soul of a democracy ;" and that virtue, which is, above all, required to uphold a system, into which its principles are liberally infused, and to prevent its degenerating into an odious tyranny, is MODERATION. For although I do not altogether despair with Mr. De Tocqueville, of the possibility of presenting some check in the constitution of the government to the unbridled career of a triumphant party, yet I am not insensible to the difficulty of providing a just counterpoise to that power in the state, which, in the structure of the system, is made to predominate. Thus in our institutions, the principle is avowed, (though the state of the fact does not correspond with it) that the majority must rule : and how to restrain that majority, whilst in the exercise of its powers, from excesses destructive of the rights of the minority, is the great problem which, it would seem, is yet to be solved. For it must be confessed, however painful and humiliating the acknowledgment, that many recent occur-

rences abundantly demonstrate, that *we* have hitherto fallen far short of the great discovery. The substitution of a representative body, for the great body of the people, has ever been looked upon by our sages as a certain security against the evils of popular excitement, and the excesses of a dominant party over their prostrate adversaries. In their deliberations were anticipated a calmness and moderation, a sense of justice and respect for right, which, it had been found by the experience of the ancient democracies, were not to be expected in the heated and tumultuary meetings of an excited populace. Yet these expectations have not always been realized. In the political struggles which we have witnessed for many years past, it has lamentably occurred, that as the contending parties have alternately predominated, the eagerness of the strife, and the exultations of victory have silenced the dictates of justice, and drowned the whispers of moderation. The successful party has swept from office, as with a besom, the adherents of its adversaries ; and even on the floor of the legislative assembly, the freedom of debate has been stifled on one side, by the harsh and improper application of the previous question, and on the other, by the adoption of that unprecedented novelty in parliamentary proceedings, familiarly called the one hour rule.

Happily however for the nation, this arbitrary spirit has only manifested itself hitherto, on questions of general politics, on which every section of the nation has happened to be divided. Its oppression therefore has not been very sensibly felt, since in our government, so long as the parties are completely commingled, the majority can never very seriously tyrannize over their adversaries, without injury to themselves. But when upon any great question, such as that of abolition, or the tariff, the interests and feelings of different sections of the union are found to be antagonizing, the strongest appre-

hensions may well be entertained of the result ; unless the majority, or at least a sufficient portion of them be restrained from a violation of the rights of property, or the great and vital interests of the minority, by a due respect to what is demanded by justice, dictated by moderation, or suggested by an enlightened and generous forbearance.

4. I proceed next to observe, that in pursuing the only legitimate object of government, to wit, the general welfare and happiness of the whole society, our course is to be directed by enlarged and liberal views of what the *lasting* interest of the community requires, rather than by a confined and narrow attention to the wants or the vexations of the moment, or the partial concerns of a particular branch of the public prosperity. Unfortunately however, as I have already observed, mankind have never been of one opinion, as to what was best calculated to advance the general good. The largest portion of our race appear to have been dazzled, by the power and the splendor which have attended monarchical institutions, under the direction of distinguished monarchs ; or they have been fascinated by the happiness and quiet which has sometimes reigned under the beneficent dominion of a "patriot king." They can forget in the contemplation of the virtues of a Titus or an Antonine, the fires of a Nero and the butcheries of a Domitian. They shudder at the horrors of a *conciergerie*, and are therefore ready to fly to the opposite extreme—the sullen stillness of despotic power. They look upon the wealth and grandeur of the state, the power of its armies, the triumphs of its navies, the magnificence of its architecture, and the refinements of its literature, until they are incapable of perceiving the wretchedness and penury which too often follow in their train. They lose their recollection of great objects of society, or delude themselves with the belief, that the true mode of attaining them, is to make the nation great. They are insensible to

the sad truth conveyed in the beautiful language of the moralizing poet :

Ill fares the land to hastening ills a prey,
Where wealth accumulates and men decay ;
Princes and lords may flourish or may fade,
A breath can make them as a breath has made,
But a bold peasantry their country's pride,
When once destroyed can never be supplied.

We shall have occasion hereafter, if time permits, to examine the pretensions of monarchical institutions to the admiration and love of mankind. At present we have only to advert to the fact, that that form of government has won largely upon the respect and affections of most nations of the world, both ancient and modern, in order to maintain the assertion, that societies have widely differed as to the principal aim of government, and the best mode of attaining it. For while some are advocates for monarchy and its attendant greatness, others have preferred an aristocracy and some among the ancients, and ourselves among the moderns, decide in favor of the republican forms of government. The friends of aristocracy have always sustained it, upon the supposition that it secured superior wisdom and more elevation of character ; while the republican, looking to the happiness of the whole as the main end of political institutions, is content to surrender some splendor and magnificence for the blessings of freedom. He takes the chance of the wisdom of a representation by election, in lieu of hereditary succession ; and of securing the devotion of the law-giver to the general interest, by frequent elections, instead of trusting it to a body of nobles, whose power is independent of the people, while their interests are most usually adverse and conflicting.

With these different views prevailing in the world, let us endeavor on our part to discover, what ought to be the primary objects of political institutions. When we have agreed upon these, we shall

be the better enabled to conduct the enquiry as to the form of government best adapted to attain them ; and thus we shall be brought to a consideration of the three principal forms, and of the mixed governments which have been created by compounding them.

The primary object of all associations or communities of men, is the protection and defence of their persons and their rights, from all aggression. This aggression may either be from within or without : from within when our individual rights are assailed by other members of the same society ; and from without, when another nation or society attacks our own, and violates its rights and threatens its subjugation. However admirably a government may be otherwise constituted, however perfectly its laws may be calculated to protect the rights and liberties of its people against *each other*, and to promote their internal prosperity and happiness, it availeth nothing, if it is unable to protect itself against a foreign power. The lust of dominion is too deeply rooted in the human heart, to permit any nation long to maintain her independence, unless she has the ability to defend herself, or can call around her the protection of other nations against an invader. The first and most important end of every government therefore, is the capacity of self-defence ; and *other things being equal*, that would be the best, which is best adapted to secure that indispensable object.

Now to the capacity of self-defence there are many things essential. There must be adequate physical power or military strength, and of course an adequate population. There must be adequate wealth to meet the wasteful expenditures of war, to provide and sustain the necessary troops and to equip for sea the navies which are necessary in hostilities between maritime states ; and lastly, there must be among the people energy and courage in the field ; fortitude and generous submission to sacrifici-

ces, a devoted love of country, and a strong and abiding attachment to its institutions, and its laws.

If these be essentials to the defence of nations, it will easily be perceived that without foreign aid, a diminutive state would be a prey to every invader. And hence it is clear, that *pure* democracies, which must be confined to narrow limits, can never be well calculated to attain this first and most essential end of government. They can never have the strength to sustain themselves, except by the aid of others on whom at length they will become dependent. To give sufficient power for self-defence therefore, there must be a territory extensive enough to furnish adequate population. This may indeed be less, where a country is impracticable, as among the Swiss, whose lofty mountains are in no small degree the barriers of their liberty. Moreover, it sometimes happens, that small states are protected by their insignificance, and by a poverty which offers no temptations to the rapacity of an invader. St. Marino in her lofty aiery, may remain for ages more, as safe as she has hitherto been from cupidity and ambition. She is defended by her poverty, even better than by her inaccessible cliffs—those lofty battlements, which nature herself has thrown around her diminutive territory.

But population alone will not suffice. Wealth, the sinews of war, must also abound, to sustain the charges of war, and to keep on foot sufficient armies to meet the exigencies of the state. This, like a powerful population, can rarely be acquired in a very limited territory, though it is true commercial cities sustained by peculiar advantages have been occasionally seen, in the history of the world, to attain to a pitch of wealth and power, sufficient to enable them to spread their conquests over distant lands. Still however, it is obvious, that a country of some extent is necessary, to secure the means of successful defence to any state, and that therefore a

pure democracy, which requires the personal attendance of every citizen in an assembly of the people, is altogether incompatible with its safety and independence. Some instances indeed may be cited, of democracies which flourished for a season, but it will hereafter be seen, that no conclusion can be drawn from their history in conflict with the positions I have laid down.

If indeed there can be any thing, which can supply the deficiency of abundant resources and powerful population in a democracy, it is the possession, in its highest degree of excellence, of the third requisite to which I have alluded. I speak of patriotic feeling, and a devoted attachment to the institutions of our country. These flourish with greatest vigor in governments of the people. The slave of a despot, follows a master to the field; the citizen of a republic fights for himself. Every blow struck by the former, but rivets his chains; every blow of the latter is for his altars and fireside. Death strikes down both—yet how different their fates!

He strikes the poor peasant, who falls in the dark,
Nor leaves e'en the wreck of a name;
He strikes the bold patriot! A glorious mark!
He falls in the blaze of his fame!

"It must be acknowledged," says a writer by no means enamored of pure democracy, "that every example of a government that has a large mixture of democratical power, exhibits something to our view which is amiable, noble, and I had almost said divine." It exhibits man erect, self-governed, independent! It exhibits the citizen strenuous in council, and intrepid in the field; bold and fearless in maintaining the liberties of the state against domestic faction, and ever ready to pour out his blood in defending his country against foreign aggression. Finally, it exhibits him returning with laurels in triumph from the combat; or stretched upon the battle ground like the brave Lochiel,

“With his back to the field and his feet to the foe!”

2. The next great end of government is internal prosperity. It would extend these lectures far beyond the limits prescribed, were I to undertake to enlarge upon this fruitful topic. I must content myself therefore here, with a brief allusion to some of the most essential constituents of the prosperity of a people, in their internal concerns.

And foremost in the catalogue is the prevalence of peace, quiet, good order, justice, obedience to the laws, and the faithful discharge of every public duty. In vain have we entered into society, in vain have we sought protection from the dangers of a state of nature, if by the transition we are plunged at once into civil war and bloodshed, and if our persons, our lives, and our property, are exposed to the dangers of mobocracy on the one hand, or the contention of domestic factions, or pretenders to a crown upon the other. The *vices* of man, alone, impel him to delight in broil and bloodshed. The virtuous man loves peace! Hobbes may have truly described the tendency of many to war. But yet he draws his portrait from the fiend-like portion of our race. The mass of mankind have no such propensities. To them, the great object of desire, is the permission to pursue their own happiness in their own way; to enjoy the fruits of their labor in peace, and to “sit beneath their own vine and fig-tree where there is none to make them afraid.” They may be misled by the ambitious, or roused to civil commotion by the arts of a demagogue, but the sound of the clarion never yet brought happiness to the homestead of the husbandman, or the cottager’s fireside.

It can indeed require no train of reasoning, nor parade of historical examples to prove, how fatal to every interest of society are the wars of domestic factions, and the bloody struggles of contending aspirants for the sceptre. These are among the mis-

chiefs of monarchy. The wars of the houses of York and Lancaster desolated England, for more than three-fourths of a century, and the scaffolds of revolutionary France, have flowed with the blood of her people whatever may have been the faction that has prevailed. But it is not to excesses of this enormous description that grow out of contests for a crown that we alone must look. There are other outrages of minor character, but still of great enormity which too often occur in republican states, that government must check, or it fails in the great objects of its institution. I mean the excesses of lawless mobs, the setting at naught the laws of order, the trampling upon the rights both of person and of property, the destroying with vandal fury the possessions of unoffending citizens, or taking the law into their own hands and punishing with death the wretched objects of their vengeance. Nay, more, if the laws of the land are not respected, if crime is left unpunished, if even the judicial tribunals fail in their attempts to bring offenders to justice, it is obvious that there is something rotten in the system. The government is radically defective in purity, or in energy, or in wisdom, where evils such as these prevail; and men will, sooner or later, fly to some stronger power which can restrain the bad, and bring offenders against the law to condign punishment.

Besides these great and important concerns, however, it must be our object in selecting the government to which we are about to commit our happiness and safety, to look to its capacity and its disposition to encourage the growth of population, the acquisition of the means of sustenance and comfort by the great mass of the people, the improvement of all classes of society by education; and the general prevalence of an enlightened and pure morality. Add to this the protection of person and property from the wrongs of individuals, or the public, security

from the oppression of public officers, or the burdens of unnecessary exactions, and freedom of action in all things in which the exigencies of society do not call for restraint, and we shall have little reason to complain of the wisdom of our choice, if we shall have embarked our happiness and liberties, in a government which is capable of securing so large a portion of good, in a state of being to which unmingled happiness and prosperity is denied. -

I shall conclude my remarks upon these topics by observing that in selecting the form of our institutions, we should look not to the securing of a particular object, or remedying a particular evil only, but to the combining the principles of the several forms of government in such degrees, as to secure to society the greatest practicable good upon the *whole*, though we must of necessity fall short of that perfection, which is confessedly unattainable in human concerns. Moreover by parity of reason, when we have once settled down upon our system, we should *not too hastily change what may occasionally disappoint our expectations*; nor should we indulge that fretful impatience which would overthrow what has once been established, because we occasionally meet with unpleasant ingredients in our cup. We must learn to be contented though not supine; and though it is our duty to correct the evils of a system which oppresses us, we should always bear in mind, that change is not of necessity for the better; and that perpetual change is among the most fearful evils in the affairs of a people.

The author already so frequently quoted, although he very vehemently controverts the notion of a social compact, admits nevertheless the existence of the right of resistance and change, on the part of the people, whenever the interests of society require it, and the grievances of the people are greater than the probable mischiefs of revolution. As there is much good sense in many of his remarks, I beg

leave to present them to you here, (though in doing so, I am deviating from the particular matter in discussion.) I give them in his own plain yet clear and forcible language. He has been speaking of the right of resistance and proceeds :

“This principle being admitted, the justice of every particular case of resistance, is reduced to a computation of the quantity of the danger and grievance on the one side, and of the probability and expense of redressing it on the other.

“But who shall judge of this? We answer, “Every man for himself.” In contentions between the sovereign and the subject, the parties acknowledge no common arbitrator; and it would be absurd to refer the decision to *those* whose conduct has provoked the question, and whose own interest, authority, and fate, are immediately concerned in it. The danger of error and abuse, is no objection to the rule of expediency, because every other rule is liable to the same or greater; and every rule that can be propounded upon the subject (like all rules which appeal to, or binds the conscience) must in the application depend upon private judgment. It may be observed, however, that it ought equally to be accounted the exercise of a man’s private judgment, whether he be determined by reasonings and conclusions of his own, or submit to be directed by the advice of others, provided if he be free to choose his guide.”

On the subject of public expediency it may be observed that, “I. It may be as much a duty, at one time, to resist government, as it is at another, to obey it—to wit, whenever more advantage will, in our opinion, accrue to the community from resistance, than mischief.” This must, however, be glaringly obvious.

“II. The lawfulness of resistance, or the lawfulness of a revolt, does not depend alone upon the grievance which is sustained or feared, but also up-

on the probable expense and event of the contest. They, who concerted the revolution in *England* were justifiable in their counsels, because from the apparent disposition of the nation, and the strength and character of the parties engaged, the measure was likely to be brought about with little mischief or bloodshed ;* whereas, it might have been a question with many friends of their country, whether the injuries then endured and threatened, would have authorized the renewal of a doubtful civil war.

“ IV. Not every invasion of the subject’s rights, or liberty, or of the constitution ; not every breach of promise, or of oath ; not every stretch of prerogative, abuse of power, or neglect of duty by the chief magistrate, or by the whole or any branch of the legislative body, justifies resistance, unless these crimes draw after them public consequences of sufficient magnitude to outweigh the evils of civil disturbance. Nevertheless, every violation of the constitution ought to be watched with jealousy, and resented as *such*, beyond what the quantity of estimable damage would require or warrant ; because a known and settled usage of governing affords the only security against the enormities of uncontrolled dominion, and because this security is weakened by every encroachment which is made without opposition, or opposed without effect.

“ V. No usage, law, or authority whatever, is so binding that it need or ought to be continued, when it may be changed with advantage to the community. The family of the prince, the order of succession, the prerogative of the crown, the form and parts of the legislature, together with the respective powers, office, duration, and mutual dependency of the several parts, are all only so many *laws*, mutable like other laws, whenever expediency requires, either by the ordinary act of the legislature, or, *if the occasion deserve it, by the interposition of the people.*

* So of our own revolution.

These points are wont to be approached with a kind of awe; they are represented to the mind as principles of the constitution settled by our ancestors, and, being settled, to be no more committed to innovation or debate; as foundations never to be stirred; as the terms and conditions of the social compact, to which every citizen of the state has engaged his fidelity, by virtue of a promise, which he cannot now recall. Such reasons have no place in our system; to us, if there be any good reason for treating these with more deference and respect than other laws, it is, either the advantage of the present constitution of government (which reason must be of different force in different countries,) or because in all countries, it is of importance, that the form and usage of governing be acknowledged and understood, as well by the governors as the governed, and because the seldomer it is changed, the more perfectly it will be known by both sides."

LECTURE V.

ON GOVERNMENT.

Political writers seem generally to have agreed, that the several simple forms of government may be reduced to three; viz: monarchy, aristocracy and democracy. The monarchical, is that in which the administration of affairs is vested in a single person; the aristocratical, where the public authority is in the hands of a distinct class of citizens, arrogating to themselves peculiar privileges; and the democratical, where all power is exercised by the people.

These three may be variously combined and then they are called mixed governments. In all, however, whether simple or mixed, the same powers are vested, in some form or other, since they all exercise the powers of sovereignty, and those powers must in every state be the same. It may be well therefore, to analyze, in the first place, the character of the sovereignty, before we enter upon the consideration of the distribution of its authority.

I have remarked heretofore, that the very existence and organization of society, implies the establishment of rules for its government; of regulations for the ascertainment and protection of the rights of all, and the enactment of penalties against the violators of persons or of property. These rules and regulations are *laws*, and the power that makes them, exercises *de facto* the supreme power, and constitutes the legislature. But when laws have been made there must be somewhere vested the power of carrying them into execution. This power is clearly distinct from the legislative, and is called the executive. It consists in nothing more than in giving effect to what a superior power has commanded. As, if the law denounces death against the murderer, the duty of enforcing that law by the condign punishment of the offender, devolves upon the executive, or on some of those numerous officers who together constitute that branch of political power. But though the *punishment* of the guilty devolves upon the executive, the *ascertainment* of his guilt, belongs to an entirely different branch of the sovereign authority, and this branch is the *judiciary*. For the power of judging, constitutes no part either of legislative or executive authority. It is a separate and distinct attribute, and in wise governments entrusted to different hands. Thus the legislature makes the law; the executive institutes its prosecutions against the infractors, the judiciary decides on their guilt, and pronounces judgment, and the execu-

tive then again steps in, and carries that judgment into execution.

Such is a true and simple analysis of the powers of government, and one would at first suppose, that there was little difficulty in constructing a machine, which would be perfectly adequate to effect its plain and obvious purposes. Unhappily for mankind, however, in all time, the science of government has proved to be the most complicated and difficult; and the ambitious and designing have too generally succeeded in perverting, to the oppression and wretchedness of the people, what was in its very origin designed for their happiness and comfort. These mischievous effects, have sometimes resulted from force, and sometimes from the arts of aspiring men, but by whatever means they have been brought about, they have generally been attended either by the *improper union*, of all or most of the powers of government in the same hands; or by vesting the great and important law making power, in a single individual, or a privileged class. The mischiefs of this latter arrangement will be the subject of remark hereafter. At present it is proper to point to some of the evils, which always flow from blending the various powers of the government in the same hands.

It is sufficiently obvious, that where all the three powers of government, are united in one man, as in Turkey, the most ruthless tyranny must be the consequence. If the monarch first makes the law, then judges of the infraction and concludes by inflicting the bowstring or the knout, no man can be safe from his oppression, or find security but in his clemency. He may enjoy immunity indeed under a Titus, but what may be his destiny under his immediate successor, Domitian? A tyrant invested with all power would enact tyrannical laws, and of course would execute them in a tyrannical manner. And as he would possess the power of *judging* also, life and liberty would be altogether exposed to his arbitrary

control. There is an end of all security, if the same man, or even the same *body of men*, whether princes, nobles, *or people*, exercise all these powers ; —that of enacting the laws—of judging of their infraction, and of executing their own judgments.

It has been said “ that most kingdoms of Europe enjoy some moderation in their government, because the prince, though he is invested with the power of making and executing the law, leaves the power of judging to his subjects. But in Turkey where the three powers are united in the Sultan’s person, the subject groans under the weight of a most frightful oppression. So in the miscalled republics of Italy, these three powers are united, and there is less liberty than in the monarchies themselves. Witness the state inquisitors in the palmiest days of Venice, and the lion’s mouth into which the basest informers, with vengeful spirit, secretly threw their written accusations. When the same body of magistrates are possessed, as judges and executors of the laws, of the whole power they have given themselves in quality of legislators, tyranny and misrule closely follow. 1 Adams, 154. They may plunder the state by legislating away its possessions to themselves ; they may plunder individuals by partial and oppressive legislation in their own favor ; and then as judges they may declare their legislation valid, and ruin the citizen by their corrupt decrees. The current of power, thus concentrated, sweeps all before it, and public and private rights find one common ruin, in the gulf of despotic rule. How wretched the subject in such a state ! How different, where the legislative hand is restrained by the consciousness, that the law which it creates, is to be enforced by another, and may fall, if oppressive, with fatal effect upon the guilty heads of those who made it.

In relation to the separation of the judiciary from the other two branches of government, Mr. Paley remarks with his usual force : “ Let us suppose that

the courts made their own laws, or that the king and parliament tried and decided causes instead of the courts; it is evident, in the first place, that the decisions of such a judicature would be so many laws; and, in the second place, that, when the parties and the interests to be affected by the law were known, the inclinations of the law-makers would inevitably attach on one side or the other; and that, where there was neither any fixed rules to regulate their determinations, nor any superior power to control their proceedings, these inclinations would interfere with the integrity of public justice. The consequence of which must be, that the subjects of such a constitution would live either without any constant laws, that is, without any known pre-established rules of adjudication whatever; or, under laws made for particular cases and particular persons, and partaking of the contradictions and iniquity of the motives, to which they owed their origin.

“ Which dangers, by the division of the legislative and judicial functions, are in this country effectually provided against. Parliament knows not the individuals upon whom its acts will operate; it has no cases or parties before it; no private designs to serve; consequently, its resolutions will be suggested by the consideration of universal effects and tendencies, which always produces impartial, and commonly advantageous regulations. When laws are made, courts of justice, whatever be the disposition of the judges, must abide by them; for the legislative being necessarily the supreme power of the state, the judicial and every other power is accountable to that; and it cannot be doubted, but that the persons, who possess the sovereign authority of government, will be tenacious of the laws which they themselves prescribe, and sufficiently jealous of the assumption of dispensing and legislative powers by any others.

“ This fundamental rule of civil jurisprudence is

violated in the case of acts of attainder or confiscation, in bills of pains and penalties, and in all *ex post facto* laws whatever, in which parliament exercises the double office of legislator and judge. And whoever either understands the value of the rule itself, or collects the history of those instances in which it has been invaded, will be induced, I believe, to acknowledge, that it had been wiser and safer never to have departed from it. He will confess at least, that nothing but the most manifest and immediate peril of the commonwealth will justify a repetition of these dangerous examples. If the laws in being do not punish an offender, let him go unpunished ; let the legislature, admonished of the defect of the laws, provide against the commission of future crimes of the same sort. The escape of one delinquent can never produce so much harm to the community, as may arise from the infraction of a rule, upon which the purity of public justice, and the existence of civil liberty essentially depend." See also Jefferson's Notes, the Letters of the Federalist, and Tucker's Blackstone, on this interesting topic.

Nor does the separation of the judiciary from the other two branches of the government do much more to afford security to *personal* liberty and to *property*, where the *legislative* and *executive* are united in the same hands. What security can there be against the encroachment and the tyranny of an executive, which is its own lawgiver ? What hope of limits upon its power to be imposed by itself ? What prospect of relief from the tyranny of the throne, when the throne itself is the legislative body, from which we ask a redress of our grievances ? The notion is fallacious ! In such a government the only reliance is on the sense of justice, and the clemency of the monarch. If he is a brute, there is nothing left but resistance or despair.

Nor is it in monarchies or aristocracies alone, that

this meretricious union of the powers of government is fruitful of mischief. Whatever the form of government, the union brings forth evil. If the legislative power is vested in the executive magistrate, the case is presented which we have just been considering. If on the other hand the executive power is intrusted to the *legislature*, in whole or in part, the mischief is corresponding. The execution of the laws being too much dependent upon the will of a many headed body, all the evils of vacillating councils, of tardiness, indecision, and inefficiency, will be felt, while occasionally, the legislative body will be tempted into extravagance, which may ultimately lead to usurpation on the one hand, or render, on the other, revolution a virtue.

“If the executive power,” says Mr. Adams, (preface, page 13) “or any considerable part of it, is left in the hands of an aristocratical or democratical assembly, it will corrupt the legislature as naturally, as rust corrupts iron, or as arsenic poisons the human body; and when the legislature is corrupted, the people are undone.” See also 3 Adams, 417 to 425.

“Whenever,” says Mr. Blackstone, “the right of making and enforcing the laws are united together, there can be no public liberty;” “but where the legislative and executive authority are in distinct hands, the former will take care not to entrust the latter with so large a power, as may tend to the subversion of its own independence and therewith of the liberty of the subject.” There is some security for good laws, when they may be brought to bear upon those who made them. But if those who make them, have the power to execute them, they will be too soon tempted to execute them upon others only, and not upon themselves. There may be some hope of resistance to executive oppression, when the law-making power and the executive are distinct. The *former* will be the champion of the people, against

a tyranny which, if not arrested, may reach themselves. But if the *legislature*, are *executive* also, all hope of relief from them is vain. A parliament may readily refuse a standing army to a king, from jealousy of *his* power. What parliament would be restrained from raising an army from jealousy of their own? A parliament may insist, *against* the crown, on frequent elections. How long before they would be tempted to *extend* the tenure of their office, instead of *curtailing* it, if they had themselves alone to fear? Where the powers are distinct, the legislative may not only be a check to the executive, but the latter also may be an efficient check to the usurpations of the former. The executive may *veto* an oppressive law of parliament, but who will look to parliament to *veto* its own law? The executive may give the alarm of legislative usurpation, but when would the legislature raise the cry against themselves?

There can be little doubt that these and such like weighty considerations together with the opinions of the most distinguished authors have given rise to the provision which is to be found in the constitution of the state of Virginia. It has in that instrument been well and distinctly declared, "that the legislative, executive, and judiciary departments, shall be kept separate and distinct; so that neither exercise the powers belonging to the other." Well it would have been, if in *practice* the framers of our state constitution, had but adhered to the great principle which they so strongly maintained in *theory*. But in the survey we propose of that instrument, we shall too often have occasion to observe, how large a portion of the powers of the government are swallowed up in the legislative vortex.

Having thus established, I trust, the importance of keeping separate the three great powers of government, we proceed next to consider in whom it would be most expedient that they should respective-

ly be vested. Let us begin with the legislature or law-making power, both because it is supreme *de facto*, as long as it continues to exercise its functions, and because its proper adjustment, very materially and indeed decidedly, influences the general character of the institutions of a state.

Now, as every workman who is called upon to devise the plan of his machine for accomplishing a particular object, first sets himself to deliberate upon its purpose, so let us, in considering the best construction of a legislative body, keep steadfastly in view the great object of promoting the security of the state, and the happiness and welfare of the people. And here it is obvious that two things are essential, good intentions and adequate ability. For all the ability in the world will be of less importance, than that the rulers be inspired by a love of country which will prompt to zeal for the public good ;—a purity and disinterestedness, which is ready to sacrifice itself for the state, and a stern integrity which is above temptation, and sets at defiance the lures of ambition, the seductions of wealth, the follies of titles, and the splendors of a court. On the other hand, these elevated virtues will not avail to secure the happiness and prosperity of the state, without wisdom in council and sagacity in the conduct of affairs. *Intelligence* and *public virtue* are therefore *the two great objects of attainment in the construction of this branch of a government*, and the grand *desideratum* is to discover, by what system they are most likely to be secured. Moreover, as with good intentions, the mass of mankind may often succeed in the attainment of praiseworthy ends, and as with bad intentions, wisdom and sagacity will but make matters worse, it would seem to follow, that our first object should be the infusion, into the body that exercises the supreme power, of the greatest attainable degree of *public spirit* or *public virtue*. If this be so, it is not difficult to shew, that in every

government there should be a large infusion of the democratic principle. For nothing is more clear than that the great body of the people, taken *en masse*, can have no other object than the prosperity and happiness of their common country. They may err as to the *means* of attaining it, but they *can* have no other wish but for its well-doing. *Its* prosperity is *their* prosperity; *its* happiness *their* happiness; *its* subjugation and *its* misery emphatically also *theirs*. Individuals *in* office, indeed, and individuals seeking office, popular generals and popular orators, flatterers and sycophants, the courtiers of popularity, and political partizans, all have *their private* and selfish views. Their own elevation, their own wealth, their own aggrandizement, are the base motives which actuate *them*. But, for *one of these*, there are hundreds of the honest yeomanry of the country, whose thoughts are never raised to office or to power; whose fields and whose firesides are the theatre of *their* action; who have nothing to ask and nothing to hope at the hand of the public but wholesome laws, protection and security;—freedom from public burdens; the blessings of peace, and exemption from the ills of war and devastation, the accursed fruits of mad ambition. These have but *one* sentiment in relation to their country, a sincere desire for its prosperity and happiness. They may be, and often are indeed, misled by demagogues, who breathe the pestilential breath of party into their honest bosoms, and pervert their virtuous feelings from their *proper* aim. Yet still that aim is good. Even Mr. Blackstone, (1 vol. 49) with all his predilections for monarchical institutions, pays a just tribute to the good intentions of the people, and estimates, as of no little value, the democratical ingredients in the British constitution. “In a democracy,” says he, “where the right of making laws resides in the people at large, public virtue or goodness of intentions is more likely to be found than

either of the other qualities of government. Popular assemblies are frequently foolish in their contrivance, and weak in their execution ; but *generally, mean to do the thing that is right and just, and have always a degree of patriotism or public spirit.*" "Democracies," he adds, "are therefore best calculated to direct the end of the laws;" and he afterwards, in speaking of the happy structure of the British government, takes occasion to remark upon "the House of Commons, as freely chosen by the people from among themselves, and as making that branch of the legislature a kind of democracy." p. 50.

Archdeacon Paley, too, in commenting on the comparative advantages of the different forms of government, has the candor to acknowledge, "that those of a republic are liberty, or exemption from needless restrictions ; equal laws ; regulations adapted to the wants and circumstances of the people ; public spirit ; frugality ; averseness to war ; the opportunities which democratic assemblies afford to men of every description of producing their abilities and counsels to public observation, and the exciting thereby and calling forth to the service of the commonwealth the faculties of its best citizens."

To these unbiassed testimonials, of two of the most zealous and distinguished admirers of monarchical government, let me refer the student to the just reflections of the distinguished Frenchman so often quoted. See De Tocqueville, 218 to 222. In concluding his very striking remarks, he observes :

"In the United States, where the public officers have no interests to promote connected with their caste, the general and constant influence of the government is beneficial, although the individuals who conduct it are frequently unskilful and sometimes contemptible. There is indeed a secret tendency in democratic institutions to render the exertions of the citizens subservient to the prosperity of the commu-

nity, notwithstanding their private vices and mistakes; whilst in aristocratic institutions there is a secret propensity, which, notwithstanding the talents and the virtue of those who conduct the government, leads them to contribute to the evils which oppress their fellow-creatures. In aristocratic governments public men may frequently do injuries which they do not intend; and in democratic states they produce advantages which they never thought of."

It would be fortunate for mankind, if these great advantages were not in a great degree counterbalanced by correspondent defects. These will be fairly presented, when we come to consider, more distinctly, the several forms of government, with their comparative merits. It is only necessary here to remark, that having found in the government of the people the principle of public virtue, we are next to see, by what means that intelligence, deliberation and wisdom in the councils of the nation are to be secured, without which the great ends of social institutions can never be effectually attained. It is lamentably true, that these are too often wanting in governments of the people. In *pure* democracies, where the assembled nation meet together to deliberate on public affairs, (as was the case in Athens,) the very character of the assembly excludes every idea of calm and deliberate reflection. The dissensions, the tumults, and the disorder which prevail in large assemblies, are familiar to all; the factions which agitate and control them arising from the attempts of the leading citizens to possess themselves of power is attested by every page in the history of the Grecian republics; the clamor and confusion of deciding questions by the vote of a multitude, and the angry passions which lead to bloodshed and broil, as the ultimate result of the public councils, all sufficiently evince, how totally inadequate a pure democracy is to produce that wisdom and intelligence in the management of affairs, which

is essential to a nation's liberty, prosperity, and happiness.

On the other hand, what has been already said abundantly shews the danger of vesting the law-making power in the hands of the prince; for the *execution* of the laws being intrusted to him, it is obvious that there can be no safety for the people, when the power shall devolve upon a tyrant. The best security which man can have against oppressive laws, is their bearing upon the lawgiver as well as upon the people. But if the prince has the power to make law, he will take care to exempt *himself* from those which are onerous and oppressive; and the history of the world, and the character of the human heart both conspire to shew, that when this is the case, the only barrier against oppression is taken away. The subject will be ground into dust, when the master does not share in his sufferings.

Absolute monarchy then, is utterly destitute of the first great requisite in social institutions. The monarch has no common feeling or common interest with his slaves. He legislates for his own security and power, and not for their happiness. Wrapped up in self, corrupted by luxury, enervated by voluptuousness, and spoiled by power, he is blind and deaf to human calamity.

He sits aloft amid the herd
Of mute barbarians bending to his nod,
And says within himself, I am a king!
And wherefore should the clamorous voice of woe
Intrude upon my ear!—AKENSIDE.

Nor is the absolute monarch presented in these dark colors by the poet only. Take but the sketch which holy writ has given of his iron rule, and my feeble language will not be needed, to stamp upon your hearts an enduring impression of the horrors of a heartless tyranny. It is to be found in that interesting passage, in which it is recited that the wayward children of Israel had demanded of Samuel,

their prophet, a king to reign over them. And Samuel prayed unto the Lord ! and the Lord in *his anger* commanded him to yield unto the people's wishes, "and to shew them the manner of the king that should reign over them."

"And Samuel told all the words of the Lord unto the people that asked of him a king. And he said, this will be the manner of the king that shall reign over you : He will take your sons and appoint them for himself, and for his chariots and for his horsemen, and some shall run before his chariots.

"And he will appoint him captains over thousands, and captains over fifties, and will set them to ear his ground and to reap his harvest, and to make his instruments of war and instruments of his chariots.

"And he will take your daughters to be confectionaries and to be cooks and to be bakers ;

"And he will take your fields and your vineyards, and your olive yards, even the best of them and give them to his servants.

"And he will take the tenth of your seed, and of your vineyards, and give to his officers and to his servants.

"And he will take your men servants, and your maid servants, and your goodly young men, and your asses and put them to his work.

"He will take the tenth of your sheep and your cattle, and ye shall be his servants.

"And ye shall cry out in that day because of your king which you shall have chosen you ; and the Lord will not hear you in that day !"

What a portrait ! Yet how many dark lines are wanting to complete the formidable resemblance. The bowstring and the knout, the sword and the scaffold, the inquisition and the bastille, the burnings at Smithfield, and the massacre of St. Bartholomew, furnish yet harsher traits in the revolting picture !

Nor is it alone in the want of public virtue and an

honest zeal for the interest of the community, that an absolute monarchy may be regarded as deficient. It is defective also, for the most part, in *intelligence*. It may sometimes chance, indeed, that he who has seized upon the throne may be a man of an enlarged and capacious mind; sagacious to perceive the importance of gathering around him all the ability of his empire, and availing himself of their wisdom in the direction of his affairs. But this must rarely be the case, and when the sceptre descends upon a fool, the affair is hopeless. It has indeed been well observed to be a silly fashion to admit (as writers often do) that if you could be always sure of a wise, active, and virtuous prince, monarchy would be the best of governments. But this is so far from being admissible, that it will forever remain true that a government, though only partially imbued with the principles of freedom, has unspeakable advantages over a *simple* monarchy. The best and wisest prince, by means of the freer communication with his people, and the greater opportunities to collect the best advice through the great councils of the nation which a parliament would give him, would have an immense advantage over a *simple* monarchy. "An assembly, composed of representatives chosen by the people in all parts of the dominion, gives the whole nation free access to the monarch, and communicates all the wants, the knowledge, the projects, and the wishes of the nation to the head of the government; it excites an emulation among all classes of the people; it removes complaints, redresses grievances, affords opportunities of exertion to genius though in obscurity, and gives full scope to all the faculties of man; finally, it opens every avenue to improvement to the legislature, to the administration, and to the public, and gives an universal energy to the human character, in every part of the state, which never can be obtained under the blighting influences of a [simple] monarchy." See Adams' Defence, Pref. 9-10.

It may, indeed, well be questioned, whether the reign of a great, a clement and beneficent prince is not in its effects more fatal to the liberties of mankind, than the misrule of an idiot or the cruelties of a tyrant. *It reconciles man to despotism!** It stills all opposition to the sovereign will. It induces such an habitual reverence for, and acquiescence in the measures of the prince, who has won the public confidence, that self-reliance is destroyed! Man forgets to think for himself, in the consciousness, that there is another to think for him. It levels whatever barriers may have existed against power, and relaxes every bond by which it was once restrained. It converts a senate or a parliament into a mere registrar of imperial edicts, and though the forms of a constitution may be preserved, the government becomes a despotism, under the false guise of a commonwealth. Such was the case under the dominion of Augustus, who affected to govern through the power of the senate, while in effect he annihilated its authority, and left it a supple tool in the hands of the gloomy and cruel Tiberius. Such too was the case in the halcyon days of Trajan and the Antonines, who for more than three quarters of a century, conducted the affairs of Rome with consummate wisdom and paternal care, but only contributed thereby to "the waveless calm" of arbitrary power, and to surrender the mistress of the world, impotent and nerveless, into the hands of a beardless boy—the tiger Commodus.

Come down to modern history, and to that particularly of the race from which we spring, and behold how many privileges have been wrung from wicked monarchs. The charters of Henry III. and John, which contain the most salutary safeguards for person and for property, the *habeas corpus* in the reign of the second Charles and his provision for triennial parliaments; the revolutions of 1648 and 1688, all prove the struggle for liberty and the pri-

vileges of the people, to be but the consequences of power abused, and tyranny no longer to be endured. In every shape, therefore, monarchy is of fearful character. In the hands of a tyrant, it is ruthless, savage and unrelenting; in the hands of a gentle and an able prince, it acquires new strength and vigor. It grows and increases unperceived, until it becomes gigantic, and falls into the hands of the unworthy successor, invested with terrific energy and irresistible power.

OF ARISTOCRACY.

If the ingredient of public virtue, or zeal for the general welfare of the whole people, is wanting in a simple or absolute monarchy, it is not more to be found in aristocratical governments. These being founded on a distinction of ranks, and a difference of privileges, the two classes are of necessity always in antagonizing positions. And though the lower class may be kept quiet and submissive by the power and ability of the nobles, yet it is obvious that their rights are outraged, and that the great purposes of society are but imperfectly accomplished, in regard to *them*. The nobles, (from the natural instincts of the human heart,) being in possession of wealth and power, are ever tenacious of their enjoyment, and greedy for more. The people, already in subjection, are incapable of resistance, and their numerous masters lord it over them with unsparing rigor. Of all species of domination, that is certainly the most odious, where the nobles not only have, as a body, the powers of government in their hands, but possess, as individuals, personal privileges and immunities over portions of their vassals. Such was the feudal system with the king at its head; (for he was only the chief baron, until his powers were increased by the body of the people, in their own defence, as a counterpoise to the tyranny of the lords.) Cast back your recollections to the frightful

accounts of feudalism, which you have recently perused, and recall the fealty and the degrading homage, and the knight-service, and the wardships, and the reliefs, and the aids and the primer seizins, with all the other burdens which ground the vassal into dust, and nothing more can be necessary to convey to you an adequate idea, of the tyranny and selfishness of a privileged aristocracy. Invested with the power of making laws, and the interests of their whole body concurring to oppress the great body of their tenants by new exactions operating for their own benefit, they have every temptation to injustice. Nay, more, each having his *own vassals* immediately under his eye, the wretched people find themselves even more oppressed, than under the dominion of a monarch, from whose injustice and from whose observation, the greater part might be removed by their distance, or concealed by their obscurity. Aggrieved by the exactions or provoked by the enormities of their *immediate* superiors, the commons have in many countries of Europe sought refuge in the monarchy, and received protection from the reigning prince, against the oppressions of the aristocracy. The depression of the barons in England, under the house of Tudor, was beheld with satisfaction by the people, although they saw the crown was thereby acquiring a power, which no limitations, at that time provided, were ever likely to confine. For grievous as is the despotism of a single man, it is scarcely so vexatious as the tyranny of a body of nobles; since he can never exercise oppression in so many places at the same time, as a numerous nobility over their respective vassals and dependents. The freedom and the satisfaction of private life, have ever been found to be more constrained and harrassed by the latter, than by the most vexatious laws or even by the lawless will of an arbitrary monarch.

“The English aristocracy is perhaps the most liberal that ever has existed. But it cannot escape

observation that in the legislation of England, the good of the poor has been sacrificed to the advantage of the rich, and the rights of the majority to the privileges of the few. The consequence is that she combines the extremes of fortune in the bosom of her society, and her perils and calamities are almost equal to her power and her renown." De Tocqueville, p. 221.

In vain then, it would seem, can man look to either of the unmixed forms of government for happiness and protection. In one only does he find that public virtue or great zeal for the good of the great body of the people, which is the only legitimate object of all social institutions, and peculiarly essential in the law-making power; and in that one there are probably defects which require the infusion of some other principles for their correction. For admitting that a pure democracy is animated by the purest intentions, yet it is sufficiently apparent, from what has been adverted to, that it is not fitted for deliberation, nor are its measures likely to be generally the result of wise and judicious councils. Moreover, as it is very obvious, that it is ill adapted to fulfil the executive and judicial functions, which it would be dangerous to intrust to the hands of the law-making power, we are driven of necessity to the formation of a mixed government for the attainment of our ends. And in order the better to be enabled to determine what is best, it behoves us to become somewhat more intimately acquainted with the principal advantages and disadvantages, and also with the spirit and tendencies of the three simple forms of government.

LECTURE VI.

OF THE THREE SIMPLE FORMS OF GOVERNMENT.

We have already had occasion to remark that the several simple forms of government have been generally reduced by political writers to three, viz : monarchy, aristocracy, and democracy.

But though these may be regarded as the three simple principles into which governments may be resolved, yet it is probable that all *actual* governments are composed of some combination and intermixture of one or more of the several forms ; and are not anywhere to be found existing in a pure and elementary state. And accordingly as one of these several principles predominates over the rest, it gives its name and communicates its general character to the government. Thus, Athens was called a democracy, even with its Archons. Rome was at one time an aristocracy, in spite of the consuls and *comitia centuriata* on the one hand, and the tribunes and *comitia tribunitia* on the other. England is *called* a monarchy, notwithstanding its nobility and the infusion of the principles of democracy to be found in its institutions. Perhaps it is more truly an aristocracy of birth and wealth combined, balanced and checked by a large infusion of monarchical principles on one hand, and some important democratical forms on the other.

But notwithstanding the intermixture, the principles of the several infused ingredients are felt and preserved in all the operations of the system ; that which is predominant, however, giving very much of

its peculiar character to the whole. Hence it is that we should make ourselves familiar with the peculiar characteristics of each. Let us take them in their order.

The advantages which have been attributed to monarchy by its admirers might perhaps be summoned up in its **STRENGTH**. In detail they are said to be "unity of council, activity, decision, secrecy, dispatch; the military strength and energy which result from these qualities of government; the exclusion of popular and aristocratical contentions; the preventing by a known rule of succession of all competition for the supreme power, and thereby repressing the hopes, intrigues, and dangerous ambition of aspiring citizens."—Paley. These are qualities largely infused into the British constitution. Without, by any means, admitting the entire correctness of this view of the matter, it may safely be conceded that the principle of monarchy is *strength and vigor*; and that, if ably and faithfully administered, it has capacities for effecting great ends by vigorous and efficient means, springing from its unity of purpose, its activity, its decision, and its uncontrolled and untrammelled action. These are indeed valuable objects in government, and in so far as they can be secured, without incurring the mischiefs by which they are sometimes attended, it is certainly desirable that they should be infused into every system, which is intended to promote the prosperity and power of the nation. But unfortunately, the mischiefs and dangers of monarchy are of an appalling character where it is not adequately restrained. It is conceded by its admirers that "its dangers are tyranny, expense, exaction, military domination; unnecessary wars waged to gratify the passions of an individual, and the risk of the character of the reigning prince;"—Paley,—since the successor of an able, wise, politic and patriotic monarch, may be a tyrant, a madman or a fool; in whose hands those fearful

powers, wielded by his predecessor for the benefit of the people, may be perverted to their oppression or injudiciously employed to their ruin and destruction.

Quidquid delirant reges plectuntur Achivi !

Nor is this all ! The possession of power generates the love of it, and the march of power is ever onward. In the hands of a *good* king, accumulation of privileges and authority in the crown is conceded on the part of the people to his virtues ; and are exercised, because the beneficent monarch is conscious of his own good intentions. They pass to a tyrannical successor who holds fast what he gets, and gets more by the operation of that powerful machinery which is committed to his hands. Add to these considerations the corruptions employed to secure retainers, the patronage sought and acquired to strengthen power, the tendency to luxury and regal splendor, and we may well hesitate to concur in the blind admiration mankind has ever paid to monarchy. But when we further call to mind, that the operation of the system is always to aggrandize the few at the expense of the many, and to create a community of wealthy retainers at court, and despised and suffering *paupers* throughout the land, we can have little doubt that a preponderance of the monarchical principle, is less calculated to effect its boasted ends on the one hand, than to prove fatal to the nation's happiness on the other.

The advantages attributed to *aristocracy* consist in the wisdom which may be expected from experience and education : a permanent counsel naturally possesses experience, and the members who succeed to their places in it by inheritance, will probably be trained and educated with a view to the stations which they are destined by their birth to occupy. Paley. Its mischiefs are, dissensions in the ruling orders of the state, (which from the want of a common superior are liable to proceed, in their contests

for power, to the most desperate extremities;) and oppression of the lower classes by the privileged or higher orders, and by laws and institutions partial to the separate interests of the law makers.—Paley.

In these remarks of Mr. Paley there is too much, I apprehend, attributed to the supposed wisdom of the aristocracy. Experience has demonstrated that in wisdom and capacity for public affairs, a nobility does not always surpass the representatives of the Commons. The history of England might be confidently appealed to for the proof. The house of Lords can boast of no superiority of talent or acquirement, over the members of the lower house, and particularly if we take from them those, who hold their seats among the peers, by a patent of nobility conferred upon themselves, for their distinguished career in the other house of parliament. Perhaps, indeed, it might not be too hazardous to affirm, that for centuries past the Commons have exhibited a decided superiority over the Lords; the consequence of which has been, that the high offices of the government are almost always found in the hands of a commoner. The Walpoles and St. Johns, the Pitts and the Foxes, the Castlereaghs and the Peels, the Cannings and the Broughams, may challenge competition with the noblest members of the British peerage. Yet all of them were commoners themselves. Who among the degenerate descendants of the Lancasters, the Yorks, the Richmonds or the Warwicks can now boast of being “lords of the ascendant?” *Their suns* have set, and their great and shining lights have dwindled to twinkling stars, that scarce are seen amid the blaze of rising constellations. Those who hold their patent of nobility by inheritance, have been beautifully compared to stars, which are reflected from the calm and still surface of the ocean. They would not appear there but for their bright originals in heaven. If the house of Lords has been too contemptuously called

the mausoleum of *genius*, yet it must be conceded to be absolutely necessary to renovate its strength, by frequent infusions of the wholesome vigor of the Commons. Enervated by luxury, and deprived by the possession of boundless wealth and conventional dignity, of the strongest stimulants to intellectual effort, they would degenerate into a hospital of imbeciles, but for the healthy influence of new-made-peers. We cannot then, I think, concede to aristocracy the title it arrogates to permanent wisdom and ability, while on the other hand it has been attended, wherever it has wielded the powers of sovereignty, by the most grinding oppression of the great body of the people, and by the other mischiefs to which we already have adverted.

“The advantages of a **REPUBLIC**,” says a devoted admirer of the British monarchy, (Mr. Paley. See also the *Federalist*, No. 71,) “are liberty or exemption from needless restrictions; equal laws; regulations adapted to the wants and circumstances of the people; public spirit, frugality, averseness to war; the opportunities which democratic assemblies afford to men of every description, of bringing forward their abilities and counsels to public observation, and the exciting thereby and calling forth to the service of the commonwealth the faculties of its best citizens.”

On the other hand the evils of a republic are by the same writer said to be “dissensions, tumults, factions; the attempts of powerful citizens to possess themselves of the empire; the confusion, rage, and clamor which are the inevitable consequences of assembling multitudes, and of propounding questions of state to the discussion of the people; the delay and disclosure of public counsels and designs; and the imbecility of measures retarded by the necessity of obtaining the consent of numbers; lastly, the *oppression of the provinces* which are *not admitted to a participation in the legislative power*.”

In these animadversions, if our devotion to the republican character of our own institutions forbids us altogether to concur, yet we must in all fairness admit that there is too much truth in the picture in respect to a wild and uncontrolled democracy, such as existed at one time in the Athenian commonwealth. Happily, however, mankind are not driven to the dangerous resort of a pure democracy, in flying from the horrors of a gloomy despotism, or the not less terrible oppressions of a heartless aristocracy. *We* seek for refuge in mixed governments, and *our* business is so to mingle the ingredients in our power as to produce the most wholesome and salutary results.

We shall, therefore, now proceed to examine the structure and organization of mixed governments and to enquire into their probable operation and effect in promoting the only legitimate objects of social institutions, the happiness of the people, and their security from foreign danger and domestic violence.

LECTURE VII.

OF MIXED GOVERNMENTS.

"A mixed government," says Mr. Paley, "is composed of two or more of the simple forms of government above described—and, in whatever proportion each form enters into the constitution of a government, in the same proportion may both the advantages and evils, which we have attributed to that form, be expected; that is, those are the uses

to be maintained and cultivated in each part of the constitution, and these are the dangers to be provided against in each. Thus, if secrecy and dispatch be truly enumerated amongst the separate excellencies of regal government; then a mixed government, which retains monarchy in one part of its constitution, should be careful that the other estates of the empire do not, by an officious and inquisitive interference with the executive functions, which are, or ought to be, reserved to the administration of the prince, interpose delays, or divulge what it is expedient to conceal. On the other hand, if profusion, exaction, military domination and needless wars, be justly accounted natural properties of monarchy, in its simple unqualified form; then are these the objects to which, in a mixed government, the aristocratic and popular parts of the constitution ought to direct their vigilance; the dangers against which they should raise and fortify their barriers; these are departments of sovereignty, over which a power of inspection and control ought to be deposited with the people.

“The same observation may be repeated of all the other advantages and inconveniences which have been ascribed to the several simple forms of government; and affords a rule whereby to direct the construction, improvement, and administration of mixed governments, subjected however to this remark, that a quality sometimes results from the conjunction of two simple forms of government, which belongs not to the separate existence of either: thus corruption, which has no place in an absolute monarchy, and little in a pure republic, is sure to gain admission into a constitution, which divides the supreme power between an executive magistrate and a popular council.”—Paley.

Without cavilling at any part of these remarks of the very sensible and intelligent author, I shall only here premise, that it may not perhaps be easy to re-

duce our own institutions, whose character we are most interested in observing, to the class of mixed or unmixed governments, *as defined by the writers upon political topics*. Its infusion of the monarchical principle on the one hand is so minute, and that of the democratical so pervading, that it can with little propriety be classed with those mixed governments, in which the king is hereditary, and invested with the largest and most formidable powers. Yet as there are points of resemblance in some of their important features, between the British institutions and our own, it may not be amiss to present to the student a view of the former, as it is very certainly the best specimen of a mixed monarchy which is afforded by the nations of Europe, whose systems alone are worthy of our observation. In doing this I cannot do better than to refer the class, in addition to what they will find in Mr. Blackstone, to Mr. Paley's defence of the British constitution; as being one of the most candid, if not the most successful, while it has at the same time the merit of succinctness, so important to us from the narrow limits allotted for these disquisitions. The works of Delolme and of Miller merit all the encomiums which have been lavished on them, and are well worthy of diligent perusal. But they are too voluminous for our use here. The same consideration will induce me to *read* for the instruction of the student, Mr. Paley's defence. Book 6, ch. 7.

“By the constitution of a country, is meant, so much of its laws as relates to the designation and form of the legislature; the rights and functions of the several parts of the legislative body; the construction, office, and jurisdiction of the courts of justice. The constitution is one principal division, section, or title of the code of public laws; distinguished from the rest only by the superior importance of the subject of which it treats.

“The constitution of England, like that of most

other countries in Europe, hath grown out of occasion and emergency ; from the fluctuating policy of different ages ; from the contentions, successes, interests, and opportunities of different orders and parties of men in the community. It resembles one of those old mansions, which, instead of being built all at once, after a regular plan, and according to the rules of architecture at present established, has been reared in different ages of the art, has been altered from time to time, and has been continually receiving additions and repairs suited to the taste, fortune, or conveniency of its successive proprietors. In such a building, we look in vain for the elegance and proportion, for the just order and correspondence of parts, which we expect in a modern edifice ; and which external symmetry, after all, contributes much more perhaps to the amusement of the beholder, than the accommodation of the inhabitant.

“ In the British, and possibly in all other constitutions, there exists a wide difference between the actual state of the government and the theory. The one results from the other ; but still they are different. When we contemplate the *theory* of the British constitution, we see the king invested with the most absolute personal impunity ; with a power of rejecting laws, which have been resolved upon by both houses of parliament ; of conferring by his incorporation, upon any set or succession of men he pleases, the privilege of sending representatives into one house of parliament, as by his immediate appointment he can place whom he will in the other. What is this, a foreigner might ask, but a more circuitous despotism ? Yet, when we turn our attention from the legal extent to the actual exercise of royal authority in England, we see these formidable prerogatives, dwindled into mere ceremonies ; and in their stead, a sure and commanding influence, of which the constitution, it seems, is totally ignorant, growing

out of that enormous patronage, which the increased territory and opulence of the empire has placed in the disposal of the executive magistrate.

“Upon questions of reform, the habit of reflection to be encouraged, is a sober comparison of the constitution under which we live, not with models of speculative perfection, but with the actual chance of obtaining better. This turn of thought will generate a political disposition, equally removed from that puerile admiration of present establishments which sees no fault, and can endure no change, and that distempered sensibility, which is alive only to perceptions of inconveniency, and is too impatient to be delivered from the uneasiness which it feels, to compute either the peril, or expense of the remedy. Political innovations commonly produce many effects besides those that are intended. The direct consequence is often the least important. Incidental, remote, and unthought of evils or advantages frequently exceed the good that is designed, or the mischief that is foreseen. It is from the silent and unobserved operation ; from the obscure progress of causes, set at work for different purposes, that the greatest revolutions take their rise. When Elizabeth, and her immediate successor, applied themselves to the encouragement and regulation of trade, by many wise laws, they knew not, that, together with wealth and industry, they were diffusing a consciousness of strength and independency, which would not long endure, under the forms of a mixed government, the dominion of arbitrary princes. When it was debated whether the mutiny act, the law by which the army is governed and maintained, should be temporary or perpetual, little else, probably, occurred to the advocates of an annual bill, than the expediency of retaining a control over the most dangerous prerogative of the crown—the direction and command of a standing army : whereas, in its effect, this single reservation has altered the

whole frame and quality of the British constitution. For since, in consequence of the military system, which prevails in neighboring and rival nations, as well as on account of the internal exigencies of government, a standing army has become essential to the safety and administration of the empire ; it enables parliament, by discontinuing this necessary provision, so to enforce its resolutions upon any other subject, as to render the king's dissent to a law, which has received the approbation of both houses, too dangerous an experiment any longer to be advised. A contest between the king and parliament, cannot now be persevered in, without a dissolution of the government. Lastly, when the constitution conferred upon the crown the nomination to all employments in the public service, the authors of this arrangement were led to it, by the obvious propriety, of leaving to a master the choice of his servants ; and by the manifest inconveniency of engaging the national council, upon every vacancy, in those personal contests which attend elections to places of honor and emolument. Our ancestors did not observe that this disposition added an influence to the regal office, which as the number and value of public employments increased, would supersede in a great measure the forms, and change the character of the ancient constitution. They knew not, what the experience and reflection of modern ages has discovered, that patronage universally is power ; that he who possesses in a sufficient degree the means of gratifying the desires of mankind after wealth and distinction, by whatever checks and forms his authority may be limited or disguised, will direct the management of public affairs. Whatever be the mechanism of the political engine, he will guide the motion. These instances are adduced to illustrate the propositions we laid down, that, in politics, the most important and permanent effects have, for the most part, been incidental and unforeseen ;

and this proposition we inculcate, for the sake of the caution which it teaches, that changes ought not to be adventured upon without a *comprehensive* discernment of the consequences,—without a knowledge, as well of the remote tendency, as of the immediate design. The courage of a statesman should resemble that of a commander, who, however regardless of personal danger, never forgets, that with his own he commits the lives and fortunes of a multitude; and who does not consider it as any proof of zeal or valor, to stake the safety of *other* men upon the success of a perilous or desperate enterprise.

“ *The government of England*, which has been sometimes called a mixed government, sometimes a limited monarchy, is formed by a combination of the three regular species of government; the monarchy, residing in the king; the aristocracy, in the house of Lords; and the republic being represented by the house of Commons. The perfection intended by such a scheme of government is, to unite the advantages of the several simple forms, and to exclude the inconveniences. To what degree this purpose is attained or attainable in the British constitution; wherein it is lost sight of or neglected; and by what means it may in any part be promoted with better success, the reader will be enabled to judge, by a separate recollection of these advantages and inconveniences, as enumerated in the preceding chapter, and a distinct application of each to the political condition of this country. We will present our remarks upon the subject in a brief account of the expedients by which the British constitution provides,

“ 1st, For the interest of its subjects.

“ 2dly, For its own preservation.

“ The contrivances for the first of these purposes are the following:

“ In order to promote the establishment of salu-

tary and public laws, every citizen of the state is capable of becoming a member of the senate; and every senator possesses the right of propounding to the deliberation of the legislature whatever law he pleases.

“Every district of the empire enjoys the privilege of choosing representatives, informed of the interests, and circumstances and desires of their constituents, and entitled by their situation to communicate that information to the national council. The meanest subject has some one whom he can call upon to bring forward his complaints and requests to public attention.

“By annexing the right of voting for members of the house of Commons to different qualifications in different places, each order and profession of men in the community become virtually represented; that is, men of all orders and professions, statesmen, courtiers, country gentlemen, lawyers, merchants, manufacturers, soldiers, sailors, interested in the prosperity, and experienced in the occupation of their respective professions, obtain seats in parliament.

“The elections at the same time, are so connected with the influence of landed property, as to afford a certainty that a considerable number of men of great estates will be returned to parliament; and are also so modified, that men the most eminent and successful in their respective professions, are the most likely, by their riches, or the weight of their stations, to prevail in these competitions.

“The number, fortune, and quality of the members; the variety of interests and characters amongst them; above all, the temporary duration of their power, and the change of men which every new election produces, are so many securities to the public, as well against the subjection of their judgments to any external dictation, as against the formation of a junto in their own body, sufficiently powerful to govern their decisions.

“The representatives are so intermixed with the constituents, and the constituents with the rest of the people, that they cannot, without a partiality too flagrant to be endured, impose any burden upon the subject, in which they do not share themselves ; nor scarcely can they adopt any advantageous regulation in which their own interests will not participate of the advantage.

“The proceedings and debates of parliament, and the parliamentary conduct of each representative, are known by the people at large.

“The representative is so far dependent upon the constituent, and political importance upon public favor, that a member of parliament cannot more effectually recommend himself to eminence and advancement in the state, than by contriving and patronizing laws of public utility.

“When intelligence of the condition, wants, and occasions of the people, is thus collected from every quarter, when such a variety of invention, and so many understandings are set at work upon the subject, it may be presumed, that the most eligible expedient, remedy or improvement, will occur to some one or other ; and when a wise counsel, or beneficial regulation is once suggested, it may be expected, from the disposition of an assembly so constituted as the British house of commons is, that it cannot fail of receiving the approbation of a majority.

“In the defence of the empire ; in the maintenance of its power, dignity, and privileges, with foreign nations ; in the advancement of its trade by treaties and conventions ; and in the providing for the general administration of municipal justice, by a proper choice and appointment of magistrates, the inclination of the king and of the people usually coincide ; in this part, therefore, of the regal office, the constitution entrusts the prerogative with ample powers.

“The dangers principally to be apprehended from regal government, relate to the two articles, of *taxation* and *punishment*. In every form of government, from which the people are excluded, it is the interest of the governors to get as much, and of the governed to give as little as they can : the power also of punishment, in the hands of an arbitrary prince, oftentimes becomes an engine of extortion, jealousy, and revenge. Wisely, therefore, hath the British constitution guarded the safety of the people, in these two points, by the most studious precautions.

“Upon that of *taxation* ; every law, which, by the remotest construction, may be deemed to levy money upon the property of the subject, must originate, that is, must first be proposed and assented to, in the house of commons : by which regulation, accompanying the weight which that assembly possesses in all its functions, the levying of taxes is almost exclusively reserved to the popular part of the constitution, who it is presumed, will not tax themselves, nor their fellow subjects, without being first convinced of the necessity of the aids which they grant.

“The application also of the public supplies, is watched with the same circumspection, as the assessment. Many taxes are annual ; the produce of others is mortgaged, or appropriated to specific services ; the expenditure of all of them, is accounted for in the house of commons ; as computations of the charge of the purpose, for which they are wanted, are previously submitted to the same tribunal.

“In the infliction of *punishment*, the power of the crown, and of the magistrate appointed by the crown, is confined by the most precise limitations : the guilt of the offender must be pronounced by twelve men of his own order, indifferently chosen out of the county where the offence was committed : the punishment, or the limits to which the punish-

ment may be extended, are ascertained and affixed to the crime, by laws which knew not the person of the criminal.

“ We proceed, in the second place, to enquire in what manner the constitution has provided for its own preservation ; that is, in what manner each part of the legislature is secured in the exercise of the powers assigned to it, from the encroachment of the other parts. This security is sometimes called the *balance of the constitution* ; and the political equilibrium, which this phrase denotes, consists in two contrivances—a balance of power, and a balance of interest. By a balance of power is meant, that there is no power possessed by one part of the legislature, the abuse, or excess of which is not checked by some antagonist power, residing in another part.—1 B. C. 153. Thus the power of the two houses of parliament to frame laws is checked by the king’s negative ; that if laws subversive of regal government should obtain the consent of parliament, the reigning prince, by interposing his prerogative, may save the necessary rights and authority of his station. On the other hand, the arbitrary application of this negative is checked by the privilege which parliament possesses, of refusing supplies of money to the exigencies of the king’s administration. The constitutional maxim, “ that the king can do no wrong,” is balanced by another maxim, not less constitutional, “ that the illegal commands of the king do not justify those who assist, or concur, in carrying them into execution ;” and by a second rule, subsidiary to this, “ that the acts of the crown acquire not any legal force, until authenticated by the subscription of some of its great officers.” The wisdom of this contrivance is worthy of observation. As the king could not be punished, without a civil war, the constitution exempts his person from trial or account ; but lest this impunity should encourage a licentious exercise of dominion, various obstacles

are opposed to the private will of the sovereign, when directed to illegal objects. The pleasure of the crown must be announced with certain solemnities, and attested by certain officers of state. In some cases, the royal order must be signified by a secretary of state ; in others it must pass under the privy seal, and in many, under the great seal. And when the king's command is regularly published, no mischief can be achieved by it, without the ministry and compliance of those to whom it is directed. Now, all who either concur in an illegal order, by authenticating its publication with their seal or subscription, or who in any manner assist in carrying it into execution, subject themselves to prosecution and punishment, for the part they have taken ; and are not permitted to plead or produce the command of the king, in justification of their obedience.* But farther ; the power of the crown to direct the military force of the kingdom, is balanced by the annual necessity of resorting to parliament for the maintenance and government of that force. The power of the king to declare war, is checked by the privilege of the house of commons, to grant or withhold the supplies by which the war must be carried on. The king's choice of his ministers is controlled by the obligation he is under of appointing those men to offices in the state, who are found capable of managing the affairs of his government

*Amongst the checks, which parliament holds over the administration of public affairs, I forbear to mention the practice of addressing the king, to know by whose advice he resolved upon a particular measure, and of punishing the authors of that advice, for the counsel they had given. Not because I think this method either unconstitutional or improper, but for this reason, that it does not so much subject the king to the control of parliament, as it supposes him to be already in subjection. For if the king were so far out of the reach of the resentment of the house of commons, as to be able, with safety, to refuse the information requested, or to take upon himself the responsibility inquired after, there must be an end of all proceedings founded in this mode of application.

with the two houses of parliament. Which consideration imposes such a necessity upon the crown, as hath in a great measure subdued the influence of favoritism ; insomuch, that it is become no uncommon spectacle in this country, to see men promoted by the king to the highest offices, and richest preferments, which he has in power to bestow, who have been distinguished by their opposition to his personal inclinations.

“ By the *balance of interest*, which accompanies and gives efficacy to the *balance of power*, is meant this, that the respective interests of the three estates of the empire are so disposed and adjusted, that which ever of the three shall attempt any encroachment, the other two will unite in resisting it. If the king should endeavor to extend his authority, by contracting the power and privileges of the commons, the house of lords would see their own dignity endangered by every advance which the crown made to independency upon the resolutions of parliament. The admission of arbitrary power is no less formidable to the grandeur of the aristocracy, than it is fatal to the liberty of the republic ; that is, it would reduce the nobility from the hereditary share they possess, in the national councils, in which their real greatness consists, to the being made a part of the empty pageantry of a despotic court. On the other hand, if the house of commons should encroach upon the distinct province, or usurp the established prerogative of the crown, the house of lords would receive an instant alarm from every new stretch of popular power. In every contest in which the king may be engaged with the representative body, in defence of his established share of authority, he will find a sure ally in the collective power of the nobility. An attachment to the monarchy, from which they derive their own distinction ; the allurements of a court, in the habits and with the sentiments of which they have been brought up ; their

hatred of equality, and of all leveling pretensions, which may ultimately affect the privileges, or even the existence of their order; in short, every principle and every prejudice which are wont to actuate human conduct, will determine their choice, to the side and support of the crown. Lastly, if the nobles themselves should attempt to revive the superiorities, which their ancestors exercised under the feudal constitution, the king and the people would alike remember, how the one had been insulted, and the other enslaved, by that barbarous tyranny. They would forget the natural opposition of their views and inclinations, when they saw themselves threatened with the return of a domination, which was odious and intolerable to both.

“The reader will have observed, that in describing the British constitution, little notice has been taken of the house of lords. The proper use and design of this part of the constitution, are the following: First, to enable the king, by his right of bestowing the peerage, to reward the servants of the public, in a manner most grateful to them, and at a small expense to the nation; secondly, to fortify the power and to secure the stability of regal government, by an order of men naturally allied to its interests; and, thirdly, to answer a purpose, which, though of superior importance to the other two, does not occur so readily to our observation; namely, to stem the progress of popular fury. Large bodies of men are subject to sudden phrenzies. Opinions are sometimes circulated amongst a multitude without proof or examination, acquiring confidence and reputation merely by being repeated from one to another; and passions founded upon these opinions, diffusing themselves with a rapidity which can neither be accounted for nor resisted, may agitate a country with the most violent commotions. Now the only way to stop the fermentation, is to divide the mass; that is, to erect different orders

in the community, with separate prejudices and interests. And this may occasionally become the use of an hereditary nobility, invested with a share of the legislation. Averse to those prejudices which actuate the minds of the vulgar; accustomed to condemn the clamor of the populace; disdaining to receive laws and opinions from their inferiors in rank, they will oppose resolutions, which are founded in the folly and violence of the lower part of the community. Was the voice of the people always dictated by reflection; did every man, or even one man in a hundred think for himself, or actually consider the measure he was about to approve or censure; or even were the common people tolerably steadfast in the judgment which they formed, I should hold the interference of a superior order, not only superfluous, but wrong: for, when every thing is allowed to difference of rank and education, which the actual state of these advantages deserves, that, after all, is most likely to be right and expedient, which appears to be so to the separate judgment and decision of a great majority of the nation; at least, that, in general, is right *for them*, which is agreeable to their fixed opinions and desires. But when we observe what is urged as the public opinion, to be, in truth, the opinion only or perhaps the feigned professions of a few crafty leaders; that the numbers who join in the cry, serve only to swell and multiply the sound, without any accession of judgment, or exercise of understanding; and that oftentimes the wisest counsels have been thus overborne by tumult and uproar,—we may conceive occasions to arise, in which the commonwealth may be saved by the reluctance of the nobility to adopt the caprices, or to yield to the vehemence of the common people. In expecting this advantage from an order of nobles, we do not suppose the nobility to be more unprejudiced than others; we only suppose that their prejudices will be different from, and may occasionally counteract those of others.

“ If the personal privileges of the peerage, which are usually so many injuries to the rest of the community, be restrained, I see little inconvenience in the increase of its number ; for it is only dividing the same quantity of power amongst more hands, which is rather favorable to public freedom, than otherwise.

“ There is nothing, in the British constitution, so remarkable, as the irregularity of the popular representation. The house of commons consists of five hundred and forty-eight members, of whom, two hundred are elected by seven thousand constituents : so that a majority of these seven thousand, without any reasonable title to superior weight or influence in the state, may, under certain circumstances, decide a question against the opinion of as many millions. Or, to place the same object in another point of view ; if my estate be situated in one county of the kingdom, I possess the ten thousandth part of a single representative ; if in another, the thousandth ; if in a particular district, I may be one in twenty who choose two representatives ; if in a still more favored spot, I may enjoy the right of appointing two myself. If I have been born, or dwell, or have served an apprenticeship in one town, I am represented in the national assembly by two deputies, in the choice of whom, I exercise an actual and sensible share of power ; if accident has thrown my birth, or habitation, or service into another town, I have no representative at all, nor more power or concern in the election of those who make the laws, by which I am governed, than if I was a subject of the grand seignior—and this partiality subsists without any pretence whatever of merit or propriety, to justify the preference of one place to another. Or, thirdly, to describe the state of national representation as it exists in reality, it may be affirmed, I believe, with truth, that about one half of the house of commons obtain their seats in that assembly by the election of

the people, the other half by purchase, or by the nomination of single proprietors of great estates." Great changes and improvements have been made in these respects during the late reigns.

"This is a flagrant incongruity in the constitution; but it is one of those objections which strike most forcibly at first sight. The effect of all reasoning upon the subject is to diminish the first impression: on which account it deserves the more attentive examination, that we may be assured, before we adventure upon a reformation, that the magnitude of the evil justifies the danger of the experiment.

"In the several plans which have been suggested, of an equal or reformed representation, it will be difficult to discover any proposal that has a tendency to throw more of the business of the nation into the house of commons, or to collect a set of men more fit to transact that business, or in general more interested in the national happiness and prosperity. One consequence, however, may be expected from these projects, namely, "less flexibility to the influence of the crown." And since the diminution of this influence, is the declared, and perhaps the whole design of the various schemes that have been produced, whether for regulating the elections, contracting the duration, or for purifying the constitution of parliament by the exclusion of placemen and pensioners; it is obvious to remark, that the more apt and natural, as well as the more safe and quiet way of attaining the same end, would be, by a direct reduction of the patronage of the crown, which might be effected to a certain extent without hazarding farther consequences. Superfluous and exorbitant emoluments of office may not only be suppressed for the present; but provisions of law be devised, which should for the future restrain within certain limits, the number and value of the offices in the donation of the king."

LECTURE VIII.

It is not my purpose to enter upon a labored reply of my own, to the very strong and forcible defence of the British constitution, from the pen of a writer, who usually manifests as much sound and practical sense as any other of his contemporaries. I shall content myself in the main, with offering some of the views of others, who question the pre-eminence of the government of Great Britain, as "the most stupendous monument of human invention;" and have assailed its various departments with the powers of argument, the weapons of sarcasm, and the splendor of declamation. I shall then beg leave to subjoin some general speculations of my own.

To begin, however, let me first introduce a passage from Mr. Paley himself, in which he gives a decided preference to an hereditary over an elective monarchy.

"An *hereditary* MONARCHY," says he, "is universally to be preferred to an *elective* monarchy. The confession of every writer upon the subject of civil government, the experience of ages, the example of Poland, and of the papal dominions, seem to place this amongst the few indubitable maxims which the science of politics admits of. A crown is too splendid a price to be *conferred upon merit*. The passions or interests of the electors exclude all consideration of the qualities of the competitors. The same observation holds concerning the appointment to any office which is attended with a great share of power or emolument. Nothing is gained

by a popular choice worth the dissensions, tumults, and interruption of regular industry with which it is inseparably attended. Add to this, that a king, who owes his elevation to the event of a contest, or to any other cause than a fixed rule of succession, will be apt to regard one part of his subjects as the associates of his fortune, and the other as conquered foes. Nor should it be forgotten, amongst the advantages of an *hereditary* monarchy, that as plans of national improvement and reform are seldom brought to maturity by the exertions of a single reign, a nation cannot attain to the degree of happiness and prosperity to which it is capable of being carried, unless an uniformity of counsels, a consistency of public measures and designs be continued a succession of ages."

Mr. Blackstone too, as you may recollect, delivers his sentiments as might naturally have been expected very decidedly in favor of hereditary over elective monarchy. "It must be owned," says he, (vol. 1, page 192) "an elective monarchy seems to be the most obvious, and best suited of any to the rational principles of government, and the freedom of human nature: and accordingly we find from history that, in the infancy and first rudiments of almost every state, the leader, chief magistrate, or prince, hath usually been elective. And, if the individuals who compose that state could always continue true to first principles, uninfluenced by passion or prejudice, unassailed by corruption, and unawed by violence, elective succession were as much to be desired in a kingdom, as in other inferior communities. The best, the wisest, and the bravest man, would then be sure of receiving that crown, which his endowments have merited; and the sense of an unbiased majority would be dutifully acquiesced in by the few who were of different opinions. But history and observation will inform us, that elections of every kind (in the present state of human

nature) are too frequently brought about by influence, partiality, and artifice: and, even where the case is otherwise, these practices will be often suspected, and as constantly charged upon the successful, by a splenetic disappointed minority. This is an evil to which all societies are liable; as well, those of a private and domestic kind, as the great community of the public, which regulates and includes the rest. But in the former there is this advantage; that such suspicions, if false, proceed no farther than jealousies and murmurs, which time will effectually suppress; and, if true, the injustice may be remedied by legal means, by an appeal to the tribunals to which every member of society has (by becoming such) virtually engaged to submit. Whereas in the great and independent society, which every nation composes, there is no superior to resort to but the law of nature: no method to redress the infringements of that law, but the actual exertion of private force. As therefore between two nations, complaining of mutual injuries, the quarrel can only be decided by the law of arms; so in one and the same nation, when the fundamental principles of their common union are supposed to be invaded, and more especially when the appointment of their chief magistrate is alleged to be unduly made, the only tribunal to which the complainants can appeal is that of the God of battles, the only process by which the appeal can be carried on is that of a civil and intestine war. An hereditary succession to the crown is therefore now established, in this and most other countries, in order to prevent that periodical bloodshed and misery, which the history of ancient imperial Rome, and the more modern experience of Poland and Germany, may shew us are the consequences of elective kingdoms."

After these quotations I must content myself with referring you to the opinions of Chancellor Kent on

our side of the water which are far less sanguine, I think, in favor of an elective executive than might have been expected from an American jurist. 1 Kent's Com. 273.

It is not necessary, I conceive that we should decide between the evils of these two forms of monarchy. But admitting what I am by no means disposed to deny, the peculiar mischiefs of elective monarchy where the election *is for life*, and taking it for granted that hereditary succession is to be preferred to that, let us see whether there is any just ground, for exempting it from the imputation of the very evil which it proposes to avoid. That evil is the danger of civil war, and bloodshed, consequent upon the contention for a nation's crown, which it is admitted have desolated the earth, wherever such governments have existed. But the history of every monarchy of the world, though protected by the fancied security of hereditary succession, is pregnant with evidence that it affords no such boasted advantages. The prize is too great, to permit the ambitious long to remain in peace. Secure as the monarch may fancy himself, his throne may be shaken by some towering spirit in spite of his hereditary claims. The kingdoms of France and of England have, since their foundation, seen a succession of houses, who rested their titles to the throne, not upon the right of inheritance, but upon the sword. The sceptre passed into the hands of William the Conqueror from those of Harold the Dauntless, who was himself an usurper on the death of the Confessor. The Confessor, too, intruded on his nephew's throne, who had been driven into foreign lands by the conquering arms of Canute the Great. Hereditary succession, to the contrary notwithstanding then, the crown of England was usurped in early days by various races; while in France, the Morovingian, Carlovingian and Capetian lines, in turn, be-

came predominant. But what is yet more striking, the pages of history are stained throughout with blood profusely spilled by competitors for the crown, in the *same family or house*. The Conqueror was confessedly an usurper; Rufus and Henry I. successively seized upon their brother's throne. Stephen did the like, first with his elder brother and afterwards with his cousin Matilda, who boldly asserted her right by the sword. *John* next usurped young Arthur's rights, and sought to secure his tottering throne by foul, unnatural murder. His crime has been eternized by Shakespeare's never-dying verse. Six short reigns followed, when the second Richard was deposed, and Henry of Lancaster seized upon the throne: and then began the famous struggle of the white and red roses, in which the nation was engaged, for nearly an hundred years. Then came the tyrannies of the two Henrys VII. and VIII., and of Mary and Elizabeth, and James and Charles, until the nation, tired of misrule, threw off the yoke, and Cromwell next was tyrant! Charles II. was then restored, but his brother James was soon dethroned. The crown was then settled upon William and Mary, and the heirs of the Princess Sophia; not however without war and devastation, in 1715 and 1745, on account of the pretender's claims. "Thirty kings and two minors have reigned in the distracted kingdom since the conquest, in which time, there have been eight civil wars (including the revolution) and nineteen rebellions."—Payne. What in all these contests has been the loss of human life, I know not. In the wars of the houses of York and Lancaster alone, they are computed at 91,000. The *wretchedness* which attended them, "who knows save heaven." But so it is, that with these awful blots upon the history of hereditary succession, it seems to me that nothing but the most deep and rooted prejudice can see in it a security and defence, against the acknowledged mischiefs of civil discord.

Taking the history of England as our warning, we should look upon hereditary monarchy as the direst curse; and should be ready in relation to such a halcyon state as it can boast of, to exclaim with the martyred Sydney,

Malo periculosam libertatem quam quietum servitium !

In our estimates indeed upon this subject, we ought not to exclude from consideration, the insurrections, and rebellions, the throes and the revolutions, to which the growing tyranny of centuries must inevitably give rise. There is a point of suffering and oppression, beyond which human endurance cannot go; and the struggle for freedom, against the well-trained myrmidons of a tyrant ends sooner or later in the overthrow of the despot or in the immolation of his victims. The field, or the scaffold, flow plenteously with blood, whichever proves victorious. Fatal consequence of *hereditary rule!! not chargeable upon oppressed and suffering man* for seeking to throw off the yoke, but chargeable on his oppressors; for we have the authority even of a monarchist for saying, that man is justified in rebellion, when he is trampled on and oppressed. "It may be as much a duty at one time to resist a government as it is at another, to obey it," says Mr. Paley; "to wit, whenever less mischief than advantage will accrue to the community from such resistance." "They, who concerted the revolution in England, were justifiable in their counsels, because from the apparent disposition of the nation, and the strength and character of the parties, the measure was likely to be brought about with little mischief or bloodshed." And if this be so, it would seem perfectly obvious that wherever resistance and civil war are occasioned by gross misrule, the *consequences* are to be charged to the evil ruler, rather than to the suffering people. Upon these principles, the dungeons of the bastille and the *lettres de cachét*, of despotic power, offer no small apology for

the French revolution, though they cannot justify its horrible excesses ; and a moralist might, perhaps, be perplexed by the speculation, "whether the horrors of the wars which have succeeded, and desolated Europe, may not, without injustice, be set down, to the accumulated tyrannies of an hereditary despotism."

To what I have said, it may be at least amusing to add a few paragraphs from a once very popular author on the absurdity and mischiefs of hereditary succession.

"We have heard," says our author, "the *Rights of Man* called a *levelling* system ; but the only system to which the word *levelling* is truly applicable, is the hereditary monarchical system. It is a system of *mental levelling*. It indiscriminately admits every species of character to the same authority. Vice and virtue, ignorance and wisdom, in short, every quality, good or bad, is put on the same level, kings succeed each other, not as rationals, but as animals. It signifies not what their mental or moral characters are. Can we then be surprised at the abject state of the human mind in monarchical countries, when the government itself is formed on such an abject levelling system ?—it has no fixed character. To-day it is one thing ; to-morrow it is something else. It changes with the temper of every succeeding individual, and is subject to all the varieties of each. It is government through the medium of passions and accidents. It appears under all the various characters of childhood, decrepitude, dotage, a thing at nurse, in leading strings, or in crutches. It reverses the wholesome order of nature. It occasionally puts children over men, and the conceits of nonage over wisdom and experience. In short, we cannot conceive a more ridiculous figure of government, than hereditary succession, in all its cases, presents."

"Passing over, for the present, all the evils and

mischiefs which monarchy has occasioned in the world, nothing can more effectually prove its uselessness in a state of *civil government*, than making it hereditary. Would we make any office hereditary that required wisdom and abilities to fill it? and where wisdom and abilities are not necessary, such an office, whatever it may be, is superfluous or insignificant.

“ Hereditary succession, is a burlesque upon monarchy. It puts it in the most ridiculous light, by presenting it as an office which any child or idiot may fill. It requires some talents to be a common mechanic ; but, to be a king, requires only the animal figure of a man—a sort of breathing automaton. This sort of superstition may last a few years more, but it cannot long resist the awakened reason and interest of man.

“ Experience, in all ages, and in all countries, has demonstrated, that it is impossible to control nature in her distribution of mental powers. She gives them as she pleases. Whatever is the rule by which she, apparently to us, scatters them among mankind, that rule remains a secret to man. It would be as ridiculous to attempt to fix the hereditaryship of human beauty, as of wisdom. Whatever wisdom constitutently is, it is like a seedless plant : it may be reared when it appears, but it cannot be voluntarily produced. There is always a sufficiency somewhere in the general mass of society for all purposes ; but with respect to the parts of society, it is continually changing its place. It rises in one to-day, in another to-morrow, and has most probably visited in rotation every family of the earth, and again withdrawn.

“ I smile to myself when I contemplate the ridiculous insignificance into which literature and all the sciences would sink, were they made hereditary ; and I carry the same idea into governments. An hereditary governor is as inconsistent as an heredi-

tary author. I know not whether Homer or Euclid had sons ; but I will venture an opinion, that if they had, and had left their works unfinished, those sons could not have completed them.

“ How irrational then is the hereditary system which establishes channels of power, in company with which wisdom refuses to flow ! By continuing this absurdity, man is perpetually in contradiction with himself ; he accepts, for a king, or a chief magistrate, or a legislator, a person whom he would not elect for a constable.

“ But what is this thing which Mr. Burke calls monarchy ? Will he explain it ? All men can understand what representation is ; and that it must necessarily include a variety of knowledge and talents. But what security is there for the same qualities on the part of monarchy ? or when this monarch is a child, where then is the wisdom ? What does it know about government ? Who then is the monarch, or where is the monarchy ? If it is to be performed by regency, it proves to be a farce. A regency is a mock species of a republic, and the whole of monarchy deserves no better description. It is a thing as various as imagination can paint. It has none of the stable character that government ought to possess. Every succession is a revolution, and every regency a counter-revolution. The whole of it is a scene of perpetual court cabal and intrigue, of which Mr. Burke is himself an instance. To render monarchy consistent with government, the next in succession should not be born a child, but a man at once, and that man a Solomon.

“ It is ridiculous that nations are to wait, and government be interrupted, till boys grow to be men.”

From these remarks on the objectionable features of the monarchical system, we might now proceed to show, from the practical operation of the British constitution, though aided, as it undoubtedly is, by

the democratical infusion of the house of commons, how far short it falls of providing for the general happiness and liberty, of the great body of the people. The nobility and the gentry, the wealthy merchant and the thriving farmer, are, it may be conceded, protected in the enjoyment of their rights and liberties, by the provisions of *magna charta* and the wise and salutary system of British jurisprudence. But what shall we say of *the mass*, who compose the laboring class; what of the paupers who swarm throughout the land in inconceivable distress, while pampered luxury and bloated wealth are revelling in every human enjoyment? What shall we say of the corn laws and the poor laws, and the law of settlements, which forbid the laboring man, whom the overseers pronounce likely to become chargeable to the parish, to move to any other parish than that to which in parochial language *he belonged*? What shall we say of parish charges of "so much paid for men and boys standing in the pound,"* where they had been enclosed, under statutory regulation, like the beasts of the field distrained for rent? What of the universal wretchedness pervading the lower classes, and what of the ruinous wars which have crushed the nation with their monumental debt?" But hear one of their most eloquent and able writers, (Sir James McIntosh, *Defence*, 337.) We are boldly challenged, says he, to produce our proofs; our complaints are asserted to be chimerical, and the excellence of our government is inferred from its beneficial effects. Most unfortunately for us, most unfortunately for our country these proofs are too ready, and too numerous. We find them in that monumental debt, the bequest of wasteful and profligate wars, which wrings from the peasant something of his hard earned pittance; to which the madness of political quixotism adds a *million* for every farthing that ministerial empiricism pays,

* This fact is taken from a late Review.

and which menaces our children, with convulsions and calamities, of which no age has seen the parallel. We find them in the bloody roll of persecuting statutes, that are still suffered to stain our code. * * We find them in the ignominious exclusion of great bodies of our fellow citizens, from public trusts, by tests which reward falsehood and punish probity; which profane the rites of the religion which they pretend to guard, and usurp the dominion of the God they profess to revere! We find them in the growing corruptions of those who administer the government; in the venality of a house of commons, which has become only a cumbrous and expensive chamber for registering ministerial edicts; in the increase of a nobility, arrived to a degradation by the profusion and prostitution of honors, which the most zealous partizans of democracy would have spared them. We find them above all, in the rapid progress which has been made to silence the great organ of public opinion, the press, which is the true control on ministers and parliaments, who might else, with impunity, trample on the impotent formalities, that form the pretended bulwark of our freedom. The mutual control, the well-poised balance, of the several members of our legislature are the visions of theoretical or the pretexts of practical politicians. It is a government *not of check* but of *conspiracy*, a conspiracy which can only be repressed by the energy of popular opinion."

Admitting the high wrought character of the foregoing picture, whose dark coloring received no doubt much of its gloom from the bitterness of political feeling during the throes of the French revolution, *we* may surely be excused if we hazard the assertion that the British government cannot be the *impartial* guardian and protector of the rights, and liberties, and happiness of the great body of the people. It cannot be denied that there must be something vicious or something rotten,—something posi-

tively mischievous, or something deplorably wanting, in a system where wealth and misery, grandeur and squalid poverty, haughtiness and servility, are to be found perpetually in revolting contrast. Yet let us not condemn without distinction. Let us not unjustly deny to merit, merit's due. In this, as in every good and evil beneath the sun, there are obvious gradations. No just and accurate observer, for instance, can place the political and civil liberty of a Russian or a Turk, upon the same level with that of the people of Great Britain. However strong, and indeed however natural may be our impressions and our prejudices against the structure of that government; however justly we may condemn their subjection to a monarch of inordinate powers, and the subordination of the mass of society to a proud aristocracy, we cannot without injustice deny, that there are many excellent features in their institutions, and many efficient barriers against the oppressions of the government. Even the infusion of democracy, (see 1 B. C. 50, 51, 158.) in their legislative body furnishes no inconsiderable check to the power both of crown and noble, and gives to public opinion, and to the voice of a portion of the commonalty, a prevailing influence in the councils of the nation. While therefore the British constitution, confessedly falls very far short of the liberal principles which *we* have introduced, (and as we all think so successfully) we should not be blind to those excellencies, which have served as the model of some of the most valuable features of our own institutions. The admirable securities which have been introduced for the protection of life, of personal liberty, and property; the trial by jury, the *habeas corpus*, and an independent judiciary; the existence of annual parliaments; of a co-ordinate and co-equal branch of the legislature taken from the body of the people, responsible to them, and having with them common interests and common feelings; the dependence of the crown on

the popular branch for supplies, and the changes of ministry which take place at its bidding, all give to the government of Great Britain an impress of freedom, which is no where else to be found upon earth, except on our own shores. These valuable safeguards of the subject too, it must be recollected, have been wrung from the monarchy in the struggles of six hundred years, by a people, who by foreign conquest and by feudal constitutions, had been reduced to the most degraded subjection : and if they have heretofore been unable by their efforts to elevate themselves to their proper grade on the one hand, and to bring down the powers of the crown and reduce the influence of the nobles on the other, it has more than probably arisen from the conscious enjoyment of a large portion of happiness and liberty, and from a natural and not ill-grounded dread of innovation, which leads them to bear the ills they have, rather than hazard those they know not of. That dread may have taught them, (in the language of our declaration of Independence) the solemn truth, that "*prudence dictates, that governments long established should not be changed for light and transient causes ;*" and they may accordingly, (as all mankind are prone to do) prefer "to suffer while evils are sufferable, than to right themselves by abolishing the forms to which they have been accustomed." So long as the mass of the people acquiesce in the existing state of things from these considerations, that acquiescence is to some extent at least, inconsistent with the notion that the government is *despotic*. It can only safely be affirmed that its operations are oppressive on the lower classes, and that the happiness of the body of the community would probably be promoted, by introducing into their constitution more liberal principles, and breaking down the unjust distinctions which prevails between the different ranks of society in that great and powerful kingdom. The restlessness of large portions of the

people, and the loud and well founded complaints of the great body of the laboring classes and the suffering poor, seem to justify the belief, that without some radical remedies of the existing evils by wise and judicious legislation, force—the *ultimâ ratio* of people as well as of kings—will be resorted to by the oppressed; and a remedy will be sought for in the fearful panacea of revolution. The events of the last five years, have tended not only to confirm the truth of the idea, that there is a strong democratical infusion in the British constitution, but to add very materially to that infusion by the extinction of the rotten boroughs and the exclusion of nearly sixty members of the house of commons who formerly represented these ideal cities. If this has been effected before the crown and the nobles were shorn of their locks, what may not now be expected when the rotten borough system, the Sampson of the aristocracy, has been put down and the right of suffrage has been extended to a large portion of the kingdom. The next blow is the ballot—a blow that must be struck at the undue influence of the nobles, the gentry, the capitalist and the crown on the independence of elections; and that will be followed, at no distant day, by “purifying the constitution of parliament,” as Mr. Paley remarks, “by the exclusion of placemen and pensioners.” These are indeed consummations devoutly to be wished and most confidently to be expected; for depend upon it, the remark which has been applied to aristocracy, will, in the present state of the world, prove eminently true of the democratic spirit:

Mobilitate viget, viresque acquirit eundo,
Parva metu primo, mox sese attollit in auras
Ingrediturque solo, et caput inter nubila condit.

Permit me to offer a translation in my own doggrel.

Still as it moves, with innate power it grows,
And gathers vigor as it onward goes.
At first a pigmy, soon with giant size
It lifts its head in triumph to the skies.

LECTURE IX.

OF THE BRITISH CONSTITUTION.

I have remarked that the constitution of Great Britain was in some degree tempered by the infusion of democratical principles through the house of commons. We shall see by and bye, how imperfect the infusion is, but it behooves us first to turn our eyes upon the house of lords, the supposed repository of the dignity, as it certainly is, of a large portion of the wealth and the power of the nation.

The predominance of the king in England over the aristocracy except as lord paramount under the feudal system, is not coeval with the form of government. Miller's View, 11, in note. William the Norman could neither make laws or impose taxes in his dutchy without the consent of his barons or principal landholders; and when those powerful chieftains obtained large possessions in England and became grandees of the kingdom, they doubtless asserted the same independence and the same privileges which they had enjoyed in their own country. Yet, it is evident, that William and his successors were not content with this state of things, and that they were continually striving, by masterly strokes of policy and the exercise of their power and influence, to extend their authority and to invest themselves with all the prerogatives of a great king, instead of resting contented with the more limited privileges of a lord paramount.

The struggles between the crown and the feudal

barons was carried on for centuries with various success. Though the barons were the oppressors of their vassals, they resisted the encroachments of power and availed themselves of the imbecility of the more feeble princes to wring from them their rights and privileges. Such was the case of magna charta. But from the reign of Henry VII. the union of the crown and the commons by degrees depressed the former exorbitant power of the nobility, and elevated that of the kingly office. So that in modern times, though the lords have formed indeed a third estate, yet their power would be but little felt but for their intimate connexion with the crown and the aristocracy of wealth in the house of commons. Their influence is, indeed, to be seen in the subserviency of the lower classes to the upper. Intelligent observers remark, that while between *themselves* the manners of the nobility are bland and unassuming as becomes well-bred gentlemen, yet towards their inferiors, they are haughty and overbearing. And on the other hand, though in the remaining classes of society, the higher ranks are domineering and insolent towards those beneath them, yet they are themselves condescending and deferential to the members of the aristocracy and pay the most condescending homage to all who bear a title.

There are, indeed, very marked differences between the various aristocracies which have existed in the world. In some, the whole power of the state is absolutely vested in an assembly of a particular class or order, "the members of which, nevertheless, *separately* and *individually* possess no authority or privilege beyond the rest of the community. Such was the constitution of Venice. In others, the nobles may in their several and individual capacities be invested with great personal authority and immunities such as were exercised in the feudal times by lords over their vassals. Where this is the case, and where at the same time the powers of

sovereignty are wielded by the aggregated authority of this privileged nobility, (as at one time was in effect the case with the government of Poland,) the worst and most oppressive of all governments is created. For this is a domination in which tyranny is exercised not only in the conduct of public affairs by an assembled senate, but it is brought home to the fireside of every individual through his immediate lord and master. Like the plagues of Egypt, the mischief intrudes itself into our bedchambers and our kneading troughs. The first species of aristocracy is therefore more tolerable than the last: for although many of those who compose it might be profligate enough to abuse the authority of their stations in the prosecution of private designs; yet all not being tempted to the *same* injustice, nor having the same union of design, or the same end to attain, it would be difficult to obtain the consent of a majority either to specific acts of oppression, or to oppressive laws upon the mass of the commonalty. But where the body is composed of members having vassals under their power, and all united by a common interest to maintain and to exercise their *individual* authority and exactions by augmenting the *general* power of the class, there will be no limit to human suffering but the capacity of human endurance. Moreover, a government like this is a many-headed monster;—not a government of thirty tyrants only, but of hundreds. *One* tyrant is bad enough, whether the tyranny reside in a single person or a senate, acting only as an unit; but the single tyrant or such a senate cannot exercise oppression in such infinite detail, as a numerous nobility over their respective vassals and dependents. Of all species of domination therefore, this *is* the most odious. The freedom and comfort and satisfaction of private life are more constrained and harrassed by it than by the most oppressive laws; its domiciliary visits and its endless exactions are more vexatious than the lawless will of

the most arbitrary monarch. From *his* observation and *his* injustice, the wretched subject may fly. He may shrink into obscurity, and be removed by distance from his grasp or protected by insignificance from his notice. His omnipotence is limited at least by want of omnipresence. But from an aristocracy of privileged nobility like the feudal lords there is no escape. The tyranny is as omnipresent as it is omnipotent. Like the polypus, it insinuates its attenuated fibres through all the interstices of society, and with its cancerous ramifications reaches every portion of the body politic.

A third species of aristocracy, like that of Great Britain, is more harmless than either of the former. Though invested with a share of legislative power, it cannot boast of absolute dominion, and is therefore incapable of exercising the tyranny of a Venetian senate or a Polish diet. In short, it constitutes no government of itself, being checked and controlled by crown and people. And though it springs from the stern and iron-handed tyranny of the feudal system, yet has it been so deprived of all its harsher features, as to present but little to complain of in our day in the *power* of individuals over their inferiors. The partial legislation arising from their combination with the aristocracy of wealth among the commons constitutes the real grievance of which the people have reason to complain. We have already seen the advantages attributed by Mr. Paley to this branch of the British government. Permit me to add an extract from our favorite commentator upon the same subject, whose calm and sober views are better suited to our purpose than the splendid declamation and highly wrought encomiums of Mr. Burke.

“The distinction of rank and honors is necessary in every well-governed state, in order to reward such as are eminent for their services to the public, in a manner [the most desirable to individuals,

and yet without burden to the community ; exciting thereby an ambitious yet laudable ardor, and generous emulation, in others : and emulation, or virtuous ambition is a spring of action, which, however dangerous or invidious in a mere republic, or under a despotic sway, will certainly be attended with good effects under a free monarchy, where, without destroying its existence, its excesses may be continually restrained by that superior power, from which all honor is derived. Such a spirit, when nationally diffused, gives life and vigor to the community ; it sets all the wheels of government in motion, which, under a wise regulator, may be directed to any beneficial purpose ; and thereby every individual may be made subservient to the public good, while he principally means to promote his own particular views. A body of nobility is also more peculiarly necessary in our mixed and compounded constitution, in order to support the rights of both the crown and the people, by forming a barrier to withstand the encroachments of both. It creates and preserves that gradual scale of dignity, which proceeds from the peasant to the prince ; rising like a pyramid from a broad foundation, and diminishing to a point as it rises. It is this ascending and contracting proportion that adds stability to any government ; for when the departure is sudden from one extreme to another, we may pronounce that state to be precarious. The nobility, therefore, are the pillars which are reared from among the people more immediately to support the throne ; and, if that falls, they must also be buried under its ruins. Accordingly, when in the last century the commons had determined to extirpate monarchy, they also voted the house of lords to be useless and dangerous. And since titles of nobility are thus expedient in the state, it is also expedient that their owners should form an independent and separate branch of the legislature. If they were confounded with the mass of the people, and

I like them had only a vote in electing representatives, their privileges would soon be borne down and overwhelmed by the popular torrent, which would effectually level all distinctions. It is therefore highly necessary that the body of nobles should have a distinct assembly, distinct deliberations, and distinct powers from the commons."

After this fair and candid quotation of the opinions of the most distinguished admirers of the house of lords as a constituent part of the government of Great Britain, I hope I shall be excused for offering the views of others (Tuck. Appendix, 39, 40, 222, 223, 224,) who vehemently denounce it.

"In aristocracies where the whole power is lodged in a senate, or council of men of eminent stations or fortunes, one may sometimes expect sufficient wisdom and political abilities to discern and accomplish whatever the interest of the state may require. But there is no security against factions, seditions, and civil wars; much less can this form secure fidelity to the public interest. The views of a corrupt senate will be the aggrandizing of themselves, their families, and their posterity, by all oppressions of the people. In hereditary senates these evils are certain; and the majority of such bodies may even want a competent share of talents to discharge the duties of their stations. Among men born in high stations of wealth and power, ambition, vanity, insolence, and an unsociable contempt of the lower orders, as if they were not of the same species, or were not fellow-citizens with them, too frequently prevail. And these high stations afford many occasions of corruption, by sloth, luxury, and debauchery, the general forerunners and attendants of the basest venality. An unmixed hereditary aristocracy, if not the worst, must be among the very worst forms of government, since it engenders every species of evil in a government, without producing any counter-vailing benefit, or advantage.

“ In a council of senators elected for life, by the people, or by any popular interest, there is more reason to expect both wisdom and fidelity, than in the case of an hereditary aristocracy: but here the cogent tie of responsibility is wanting; and without that, the ambitious views of enlarging their powers, and their wealth, will supercede all ideas of gratitude, or fidelity to those to whom they owe their elevation.

“ When new members are admitted into the senatorial order by an election, in which the right of suffrage is confined to such as have already obtained an admission into that order; or where the right of admission into the senate itself is vested in that body; the senate will infallibly become a dangerous cabal, (without any of the advantages desirable in civil polity,) and attempt to make their office hereditary. When senators are entitled to the privileges of that station in consequence of possessing a certain degree of wealth, the burthens of the state will, without exception, be thrown upon the poorer classes of the people. Thus aristocracy, whatever foundation it may be raised upon, will always prove a most iniquitous and oppressive form of government.”

“ The house of lords is composed either of new made peers, or of such to whom that honor has been transmitted by hereditary right; we may admit, though the fact will hardly justify it, that the new made peers have a chance of being selected for their superior wisdom; nay, that is universally the case; the portion of wisdom thus acquired, even in the creative reign of George the third, could never be sufficient to counterbalance the large majority of hereditary peers, who affect to hold in great contempt the talents and learning of their new created brethren. The wisdom of this body rests then upon the chance of natural talents, with the advantages of education to improve and mature them. As to the latter, should we admit that a child, who, from the moment he is capable of making any observation,

sees himself treated as a superior being, would have the same stimulus to improve, as one who is taught to consider the road to science as the only one which leads to distinction, no advantage could be claimed in favor of the hereditary legislator, unless it should be proved that the benefits of education are necessarily confined to that class of men.—The question rests then solely upon the mode by which the nobility become legislators, and here every argument against the transmission of talents and virtue in hereditary succession, recurs with accumulated force, the chance of this inheritance being confined by the laws to the eldest son.”*

“The senate of the United States, as we have seen, is composed of individuals selected for their probity, attachment to their country, and talents, by the legislatures of the respective states. They must be citizens of the states for which they are chosen—their merits must be known, must have been distinguished, and respected. Age must have matured the talents, and confirmed the virtues which dawned with childhood, or shine forth with youth. Principles must have been manifested, and conduct have evinced their rectitude, energy, and stability.—Equivocation of character can scarcely obtain admittance

“* The right of primogeniture to the inheritance of virtue and talents, has always appeared to be questionable, if we may draw our conclusion from the authority of the sacred scriptures. The first born son of the first man, was a murderer. The first born son of Abraham, (by a concubine it must be confessed,) was an outcast from society; his hand was against every man, and every man's hand against him. The first born son of Isaac was, by the dispensations of the divine providence, postponed to his younger brother: the first born of Jacob went up unto his father's bed, and defiled it: and the sceptre was transmitted to the race of Judah: the first born of Jesse, appeared worthy in the sight of the prophet, but he, with six of his brethren, was rejected in favor of David the youngest: and the first born of that same David, was by the same providence set aside in favor of Solomon his youngest son.”

where the trust is important, elections rare, and limited to an individual, or, at most, to two. The whole number of senators are at present limited to thirty-two—it is not probable that they will ever exceed fifty.—A late writer* has observed; that an assembly of Newtons, if they exceeded a hundred, would be a mob. The British house of peers consists of twice that number at the least, and may be increased, at the will of the prince, to any number.† The senators of America have the interest of a state to promote, or to defend. A British house of peers has the privileges of the order, the interests of the corporation of aristocracy, to advance. Their wisdom, their exertions, are directed to their own personal aggrandizement.—Those of an American senator can scarcely find an object, except the good of the nation, or of the individual state which he represents. A peer holds himself responsible to no one for his conduct; a senator is responsible to his constituents, and if he abuses their confidence, will be sure to be displaced, whilst the former hugs himself in the security and stability of his station. I say nothing of the bench of bishops. The independence of that body has been too frequently questioned to render them respectable, even in the eyes of their own nation, as a part of the legislature.

“A member of the house of lords, may make another lord his proxy,‡ to vote for him in his absence; a privilege which he is supposed to derive from sitting there in his own right; and not as one of the representatives of the nation. He may likewise, by leave of parliament enter his protest against any measure, analogous to which we have seen that the yeas and nays of either house of congress shall be called, if one fifth part of the members present concur therein.”§

* Mackintosh.

† The temporal peers of Great Britain are said to amount to two hundred and twenty at this time.

‡ 1 Black. Com. p. 168.

§ C. U. S. Art. 1. s. 5.

Next let me present you with the racy remarks of a very popular writer already cited, to whose pen our revolutionary ancestors were not a little indebted in the great struggle for our liberties.

“That, then, which is called aristocracy in some countries, and nobility in others, arose out of the governments founded upon conquest. It was originally a military order for the purpose of supporting military government (for such were all governments founded in conquest;) and to keep up a succession of this order for the purpose for which it was established, all the younger branches of those families were disinherited, and the law of *primogeniture-ship* set up.

“The nature and character of aristocracy shews itself to us in this law. It is a law against every law of nature, and nature herself calls for its destruction. Establish family justice and aristocracy falls. By the aristocratical law of primogenitureship, in a family of six children, five are exposed.—Aristocracy has never but *one* child. The rest are begotten to be devoured. They are thrown to the cannibal for prey, and the natural parent prepares the unnatural repast.

“As every thing which is out of nature in man, affects, more or less, the interest of society, so does this. All the children which the aristocracy disowns (which are all, except the eldest) are, in general, cast like orphans on a parish, to be provided for by the public, but at a greater charge. Unnecessary offices and places in governments and courts are created at the expense of the public, to maintain them.

“With what kind of parental reflections can the father or mother contemplate their younger offspring. By nature they are children, and by marriage they are heirs; but by aristocracy they are bastards and orphans. They are the flesh and blood of their parents in one line, and nothing akin to them in the other.

Let us examine the grounds on which the French constitution resolved against having a house of peers in France.

“ Because, in the first place, as is already mentioned, aristocracy is kept up by family, tyranny and injustice.

“ Secondly, because there is an unnatural unfitness in an aristocracy to be legislators for a nation. Their ideas of *distributive justice* are corrupted at the very source. They begin life by trampling on all their younger brothers and sisters, and relations of every kind, and are taught and educated so to do. With what ideas of justice or honor can that man enter an house of legislation, who absorbs in his own person the inheritance of a whole family of children, or doles out to them some pitiful portion with the insolence of a gift?

“ Thirdly, because the idea of hereditary legislators is as inconsistent as that of hereditary judges, or hereditary juries; and as absurd as an hereditary mathematician, or an hereditary wise man; and as ridiculous as an hereditary poet-laureat.

“ Fourthly, because a body of men holding themselves accountable to nobody, ought not to be trusted by any body.

“ Fifthly, because it is continuing the uncivilized principle of governments founded in conquest, and the base idea of man having property in man, and governing him by personal right.

“ Sixthly, because aristocracy has a tendency to degenerate the human species. By the universal economy of nature it is known, and by the instance of the Jews it is proved, that the human species has a tendency to degenerate, in any small number of persons, when separated from the general stock of society, and intermarrying constantly with each other. It defeats even its pretended end, and becomes in time the opposite of what is noble in man. Mr. Burke talks of nobility; let him shew what it is. The greatest characters the world have known, have

rose on the democratic floor. Aristocracy has not been able to keep a proportionate pace with democracy. The artificial noble shrinks into a dwarf before the noble of nature; and in the few instances (for there are some in all countries) in whom nature, as by a miracle, has survived in aristocracy, *those men despise it*. But it is time to proceed to a new subject."

LECTURE X.

OF THE DEMOCRATICAL PART OF THE BRITISH CONSTITUTION.

I have already called the attention of the student to that passage of the Commentaries in which Mr. Blackstone claims for the British constitution an infusion of democracy. "The house of commons," says he, "freely chosen by the people from among themselves makes the government a kind of democracy."—Vol. 1, p. 51. And again: "The commons consist of all such men of property in the kingdom as have not seats in the house of lords; every one of which has a voice in parliament, either personally, or by his representatives. In a free state, every man, who is supposed a free agent, ought to be in some measure his own governor; and therefore a branch at least of the legislative power should reside in the whole body of the people. And this power, when the territories of the state are small and its citizens easily known, should be exercised by the people in their aggregate or collective capacity, as was wisely ordained in the petty republics of Greece, and the first rudiments of the Roman state.

But this will be highly inconvenient, when the public territory is extended to any considerable degree, and the number of citizens is increased. Thus when, after the social war, all the burghers of Italy were admitted free citizens of Rome, and each had a vote in the public assemblies, it became impossible to distinguish the spurious from the real voter, and from that time all elections and popular deliberations grew tumultuous and disorderly; which paved the way for Marius and Sylla, Pompey and Cæsar, to trample on the liberties of their country, and at last to dissolve the commonwealth. In so large a state as ours, it is therefore very wisely contrived that the people should do that by their representatives, which it is impracticable to perform in person; representatives, chosen by a number of minute and separate districts, wherein all the voters are, or easily may be, distinguished. The counties are therefore represented by knights, elected by the proprietors of lands; the citizens and boroughs are represented by citizens and burgesses, chosen by the mercantile part, or supposed trading interest of the nation; much in the same manner as the burghers in the diet of Sweden are chosen by the corporate towns, Stockholm sending four, as London does with us, other cities two, and some only one. The number of English representatives is 513, and of Scots 45; in all 558. And every member, though chosen by one particular district, when elected and returned, serves for the whole realm; for the end of his coming thither is not particular, but general; not barely to advantage his constituents, but the common wealth; to advise his majesty (as appears from the writ of summons) "*de communi consilio super negotiis quibusdam arduis et urgentibus, regem, statum, defensionem regni Angliæ et ecclesiæ Anglicanæ concernentibus.*" And therefore he is not bound, like a deputy in the united provinces, to consult with, or take the advice of, his

constituents upon any particular point, unless he himself thinks it proper or prudent so to do.

“These are the constituent parts of a parliament; the king, the lords spiritual and temporal, and the commons. Parts, of which each is so necessary, that the consent of all three is required to make any new law that shall bind the subject. Whatever is enacted for law by one, or by two only, of the three, is no statute; and to it no regard is due, unless in matters relating to their own privileges.”

It cannot fail to be highly gratifying to every friend of our free institutions, resting as they do, upon the basis of democratical principles to hear these candid eulogiums, from the pen of a monarchist, upon their spirit and influence in securing the real happiness of the people. Well indeed are they deserved from every liberal minded Englishman. Imperfect as the infusion of democracy is in the British constitution it would not be difficult to trace to it all those noble principles of freedom which are the boast of Englishmen and which distinguish their institutions from the gloomy absolutism of the continent. In making this declaration, I am well aware of all that has been forcibly advanced against the state of representation in the house of commons, against the system of rotten boroughs, which prevailed before the late reform, against the venality and corruption of the body and the hosts of placemen and pensioners that crowd its hall and too pliantly obey the lead of a triumphant ministry. I am well aware that one of the most eloquent of British statesmen has declared that the appellation of the term popular representation to the house of commons is the “most insolent and preposterous abuse of language in the vocabulary of tyrants.” An abuse of language it is indeed to call it a *fair* representation even now, but it does not follow because it is unequal that it does not in *any* degree represent, the interests, the opinions, and even the wishes of the nation. It does not follow,

because the ministerial influence too readily commands the complying support of obsequious partizans to the ordinary measures of their administration, that they would find even in *them*, the supple tools who would sustain an attempt to extinguish the rays of liberty which still shine out in the British constitution amid surrounding gloom. What ministry, with all their influence, could repeal the habeas corpus or abolish the trial by jury? What ministry could muster retainers enough to dispense with annual parliaments, or to tear from the commons' house the purse strings of the nation? None—none whatever! Venal as they may be, they would with indignation hurl from the seat of power, any ministry who should venture to assault these important fortresses of their liberty. Venal as they may be, they cannot set at defiance the angry denunciations of a betrayed and indignant nation. Imperfect as the representation is, the *people* are *felt* in the deliberations of the commons; and however organized, that government in which the people are felt, is in precisely the same degree under the sanative influence of the principles of democracy. I will not say indeed that it matters not in what manner this influence is produced, but I will say that wherever it does exist, it is wholesome and benign, and, however minute, it is essentially the democratic in principle. It is an important point gained that the law-making power is in the hands of those who have a common interest and a common feeling with the great body of the people. Few men will be disposed to enact laws which are to operate to their own oppression. Few will oppress themselves from a desire to oppress others. Few who will not resist oppression by which others may suffer, when they suffer by it themselves. *Una salus commune periculum* is the strong chain which binds together the commoner and the people. Where it is destroyed, it is not broken by force but dissolved by cor-

ruption. The commoner will battle for himself, his posterity and his fellows, unless, like Judas, he has sold himself for gold ; and fortunately in all time there have been found among the members of the house of commons not a few upright patriots whom the thirty pieces could not buy. These form a phalanx which breasts the ministerial attack—sounds the tocsin to the people—casts dismay among the ranks of power, and threatens with overthrow and defeat the reckless and unscrupulous minister who would dare to aim a blow at the vitals of their constitution.

I cannot therefore doubt that though in the ordinary concerns of administration the undue influence of the crown paralyzes the popular principle of the government, and though very undue weight is conferred on rank and wealth in the house of commons itself, so as to give a preponderating influence to the higher classes even in that body, yet there is upon the whole much justice in the opinion of Mr. Blackstone, that the house of commons does give a democratic character to the British constitution.* I have said that it may be attributed every valuable principle which has been engrafted into their laws in support of the liberties of the people. To what other source can we trace them ? To the crown ? When did arbitrary power voluntarily lay down the sceptre or magnanimously tie up its own hands ? Can we trace it to the barons ? When did that iron-fisted order ever join for the emancipation of their vassals ? Never but when their object was to pull down the powers of the crown by the assistance of the people. The crown and the nobles in their ceaseless hostilities for centuries, have alternately purchased the confederacy of the commons, by the mitigation of their oppressions and the extension of their privileges and their rights. Such, from the pages of history, appears to have been the case

* Mr. Hume seems to have had the same idea of the house of commons.—Vol. 1, 432.

even with magna charta which was extorted at the point of the sword from the weakest and the basest of English monarchs. There was then no house of commons indeed and the great charter was obtained from the crown, in semblance at least by the barons alone. Two things, however, must be observed. *Two thousand knights*, with all the retainers of the feudal lords, and with inferior persons without number, "assembled together in arms and advanced to Oxford against the king." Now the knights themselves in such a number were, *in this contest with the crown*, of the people's party, and must have had a common feeling and a common concern with the great body of the commonalty, whose interests therefore they represented at Runnemeade. But this was not all. They were followed to the field by countless numbers of inferior people. These were "the thews and sinews" of the barons' power. Accordingly, as Mr. Hume has well observed, the barons who alone had enforced "on the prince this memorable charter were under the necessity of inserting in it clauses of a more extensive and more beneficent nature than those which respected themselves alone. They could not expect *the concurrence of the people*, without comprehending together with their own, the interests of inferior ranks of men; and all provisions which the barons for their own sake were obliged to make in order to ensure the fair and equitable administration of justice, tended directly to the benefit of the *whole community*." Thus we see clearly that the *rights* of the great body of the community was an *object* of the charter, and that the *weight* of the people was distinctly *felt* in its acquisition.

In another struggle with a succeeding monarch, Henry III., the earl of Leicester, a bold, a popular and rebellious noble, with a view to "increase and turn to advantage his popularity, summoned a new parliament and fixed that assembly on a more demo-

cratical basis than any which had ever been assembled since the foundations of the monarchy. He ordered returns to be made of two knights from each shire, and, what is more remarkable, of deputies from the boroughs; an order of men, which in former ages, had always been regarded as too mean to enjoy a place in the national councils. This period is commonly esteemed the epoch of the house of commons in England. But though it derived its existence from so precarious, and even from so invidious an origin as Leicester's usurpation, it soon proved, when summoned by the legal princes, one of the most useful, and in process of time, one of the most powerful members of the national constitution; and *gradually rescued the kingdom from aristocratical* as well as from *regal tyranny*. The feudal system with which the liberty, and much more, the power of the commons was totally incompatible, began gradually to decline, and both the king and the commonalty, who felt its inconveniences, contributed favor this to new power, which was more submissive than the barons to the regular authority of the crown, and at the same time afforded protection to the inferior orders of the state."—Hume's Hist. Henry III.

Such was the origin and such the uses of the house of commons, in the hands of kings and nobles, at its first institution. In the following reign of Edward it began to assume a more distinct and important character, and to grow in influence and weight. It continued for many succeeding reigns in favor with the crown as a check upon the power of the nobles. Indeed, as, even in those early days, no subsidies nor levies could be laid upon the nation without the assent of parliament, and as the commons alone could impose a burden on their constituency, the monarch was compelled at every meeting of the body to ask a vote of funds to meet his urgent necessities. In return for these, it soon became customary to prefer petitions for redress of

grievances. These causes contributed not a little to increase the weight and importance of the commons, and finally to give them that strength and influence which they now possess in the British constitution. That they are a fair, full and equal representation of the commonalty cannot be affirmed: that the influence of the crown on the floor of the house of commons, through placemen and pensioners, and in various other modes, is most extensive and mischievous cannot be denied; and that through this undue influence and that of the aristocracy of rank and wealth the representative body too rarely reflects the interests, the wishes and the feelings of the great body of the nation must in all fairness be admitted. On the other hand, if we discard the prejudices to which early education has given rise; if we look upon the operations of the government with a philosophic eye, we shall be compelled to acknowledge, that with all its defects the house of commons is an all-important safeguard of the rights and liberties of a British subject. If those who ought to have the privilege of voting are not all admitted to the polls, if the representation be still unduly apportioned between the different parts of the kingdom, if the lords and the great landholders possess the inordinate influence over their tenantry which enables them in a great degree to influence elections, still there is one security left. The law making power, so far as the commons are concerned, is in the hands of those who are in fact a part of the people—are equally bound by the laws, and have a common interest and a common feeling with them. They have a common interest and a common feeling (if they be independent) even with those who are improperly denied their right of being represented. They carry therefore into the body of the house of commons much of the popular feeling and of popular opinion; and the laws which they enact and the measures which they pursue are

in a good degree the dictates of the popular sentiment. Unfortunately, indeed, this is not always the case, as is distinctly manifested by the corn laws which the powerful influence of the great landed proprietors has still retained, to the great oppression of the laboring classes. But this results from the yet imperfect organization of the system, which is therefore still imperfect in its salutary operations and effects. The beneficent action of the late reform is neutralized in part, by the undue influence of the crown but still more by that of the wealthy and the noble over their dependants and their tenants. The consequence is, that notwithstanding the extinction of the power exerted through the rotten boroughs, and the very great extension of the right of suffrage which has recently been effected, the power of the aristocracy is still predominant through their influence over elections. If this could be effectually prevented by the introduction of the ballot, if placemen and pensioners were excluded from the hall, if the ministers of the crown were denied a seat within its walls, we should probably find the house of commons in its effects as well as in its form entitled to be ranked in the class of representative democracy and always ready to maintain and to extend, the free principles of the government.

I have been educated from my childhood in the strongest prejudices against Great Britain and her institutions. This was the natural consequence of the revolution (during the troubles of which I was born) and of the strong contrast existing in many respects between our constitutions and hers. But when I look back through the vista of ages, upon what has been, and what now is, when I trace her progress and witness the important though gradual conquest by the nation from the crown, of the most efficient fortresses against arbitrary power, I cannot withhold the justice which is their due for all which they have gained. Take even the apparently fruit-

less revolution, which after bringing Charles the First to the block, and declaring both the peers and crown to be useless and oppressive, ended at last in the despotism of Cromwell. I have seen that key which the national assembly of France presented as a fit offering to the foremost man of all this world, the immortal champion of American liberty. But where are the keys of Newgate and of the once awful tower of London? You will find them in the statute book! in that memorable statute which gave the *habeas corpus* to the nation!—in that writ which, with talismanic power unbolts the massive lock and throws open to the captive every prison-door in the kingdom!

If any other evidence were wanting of the influence of the nation upon the conduct of affairs in the British government, it is abundantly furnished by the power which parliament possesses and exercises of changing the ministry at pleasure. Possessed of the power of refusing supplies, and of paralyzing the military power of the crown, they have an efficient control over the executive branch of the government. No ministry can carry on the government without a majority in the house of commons, and those who cannot command that majority are of necessity obliged to surrender their places to others. A new course of measures is thus, *in invitum*, forced upon the crown, however averse it may really be to the change demanded by the nation. Thus in 1783, the favorites of George III. were forced to resign their power by a vote of a majority of the commons alone, though the lords were of their party; and the coalition of North and Fox was forced upon the crown, to the great annoyance of king and nobles. And though within a year these ministers were dismissed and Mr. Pitt was re-appointed, yet an appeal was found necessary to the nation through the election of a new parliament, in which the new minister was successful on account

of the odium which the India bill had excited through the nation against his predecessor. The commons, therefore, must be admitted to have a large control over the measures of the government. The power of *proposing taxes* and laws are exercised by them, the former exclusively and the latter in conjunction with the house of lords. If therefore the house were elected by the *unbiassed* vote of the electors, the government would in that regard have a most important feature of representative democracy. It might indeed be itself checked by hereditary peers and an hereditary monarch, but still the influence of the nation would be felt, and its great concerns would be mainly directed by its will. In the struggles for power too, between the contending branches of the government, it would be more likely to gain than to lose, unless its privileges were extinguished by violence and usurpation or its purity destroyed by venality and corruption. Of this indeed the late reform bill furnishes a memorable instance. The old house of commons with all its placemen and pensioners, with all the influence of rotten boroughs, and with all the inequality of representation, effected in the year 1832 a most vital reform. Fifty-six rotten boroughs were deprived of their members and a number of other insignificant boroughs were reduced to a single member. Besides these salutary measures, the right of suffrage was extended to all occupiers of houses of the value of £10 per annum who should be rated or assessed upon the poor rates; an extension which must embrace a very large portion of the constituency of the kingdom, and render the commons more than ever democratic, if the exercise of the electoral privilege could be preserved in its purity.

Unfortunately, however, the house of commons can never be said to be a fair representation of the nation's will, until its elections can be rendered unbiased and independent. So great is the influence

of the crown, of the nobles, of the great landed proprietors, of the great capitalists, of the holders of the public debt, and in short, of the combined numbers of rank and wealth, reinforced by hosts of pensioners and placemen, that it may well be doubted whether the house of commons itself, however democratical in form, has not even yet more of aristocratical leaven than of popular influence in its composition. It will not fall in with the plan of these lectures to go into an examination of that matter ; but I beg leave to refer in conclusion of these remarks on the British constitution, to a few of the judicious speculations of a distinguished writer on the increased and increasing influence of the crown.—See Miller's View, chap. 2, vol. 4. pp. 94 to 99.

LECTURE XI.

OF REPRESENTATIVE DEMOCRACY AND OUR FEDERAL SYSTEM.

The glaring defects of a *pure* democracy, the vacillating councils which distinguish it, the dissensions, tumults and factions which incessantly disturb its tranquillity, the confusion, uproar and commotions attending its deliberations, and the impossibility of adapting it to a community sufficiently extensive for self-protection, have deservedly brought it into disrepute with all writers upon the science of government. Unfortunately too, I fear, its undeniable mischiefs have had no little tendency to impair the confidence of many of our own fellow-citizens in its great and leading principle—the government of the people. The very word “democracy” sounds

harshly in the ears of many, and the will of the people is the never-ceasing subject of their sneers and their derision. Not that they do not love their country and its institutions, thoroughly imbued as they are with democratical principles, but that they love to call them by another name. "Republican government"—"representative government" they can tolerate, but call it a democracy, and it "stinks in their nostrils," though its principles are essentially democratic. I am no great stickler for names on the one hand, and certainly no admirer of *pure* democracy on the other. Yet in presenting you my views of a mixed government, which is calculated to sustain and to secure the liberties and the happiness of our people, I must beg leave, for the sake of making myself clearly understood, to use the terms "representative democracy" as distinguishing that species of institution, which I deem best adapted to those valuable objects. The term republic is too generic for our purposes. Athens was a republic, and, at the same time, a wild democracy. Rome was a republic, and yet a haughty aristocracy. Venice was called a republic with its domineering senate. Poland was styled a republic with a monarch at its head! It has been truly said, "that the name republic is given to things in their nature as different and contradictory as light and darkness, truth and falsehood, virtue and vice, happiness and misery. There are free republics and republics as tyrannical as an oriental despotism. A free republic is the best of governments and the greatest blessing which mortals can aspire to: but there have been oligarchies called republics, carried to such extremes of tyranny, that the despotism of Turkey as far as the happiness of the nation is concerned, would perhaps be preferable." The word republic then means any thing, or nothing, and is therefore ill-adapted for use in these discussions.

On the other hand, the appellation "representative democracy" seems to be perfectly distinct and definite. The government which it designates is one in which the nation's will prevails, and in so far it is a democracy,—a government of the people; but the power not being exercised by the people in person but by their agents as representatives, it is with the most perfect propriety distinguished by the name of "representative democracy." In this sense I shall use the term in these lectures, and in this sense I trust it will not be unacceptable to any portion of my hearers.

In some of my preceding lectures it has been my purpose to shew, not only that a government of the people, (by which I mean that form in which the will of the nation prevails) is alone reconcilable to natural right, but that it is more apt to be under the influence of public virtue or goodness of intentions than any other form of government whatsoever. Even in the governments of the people in their primary assemblies, it is candidly admitted by the advocates of monarchy "that they generally mean to do the thing that is right and just, and have always a degree of patriotism or public spirit." And if this be true in those small communities which alone can constitute a pure democracy, how much more true must it be in the wide spread regions of a representative democracy like ours, covering the half of a continent, and peopled by millions of unassuming citizens. In the small state where every man forms a part of the assembly of the people, every man may be lured from the path of true patriotism by the hope of promotion and power. The emoluments of office and the reins of power are within the grasp of all. But what is there, in the chances of promotion of millions of our people, to corrupt their good faith and honest intentions for the good of their country. What temptations have they to multiply offices, and to magnify powers, and to la-

vis^h the resources of the nation upon their own representatives and ministers, when of those who can look forward to political stations there is not one for thousands of those who are destined to obscurity? This indeed is one of the great securities in a government like ours, as I shall by and bye, have occasion to shew more at large; and although from the natural imperfection which is stamped upon every thing human, the machine does not always in its *operation*, work out the theoretical principles upon which it is constructed, yet there has been nothing in our history which justifies our calling in question the general fact admitted even by Mr. Blackstone and Mr. Paley, that the body of the people generally mean to do the thing that is right and just, and have always a degree of patriotism and public spirit.

If then it be true that the intentions of the people are honest and patriotic, and if it be true that in no other form of government can we expect to find so sincere a devotion to the general good, it would seem to follow that the organization of the state should be imbued with as large a portion of the democratical spirit as is practicable without rendering it at the same time liable to the alarming mischiefs which so many see in the unbridled license of a government of the people. And, moreover, the more the operation of a mixed government is to restrain the outbreaks of the democratical spirit, the more liberally may the exertion of its virtuous and beneficent tendencies be indulged. I flatter myself that in the sequel we shall discover that we are so fenced and protected by our situations, our circumstances, and the peculiar character of our institutions, that the fear of the ordinary evils of democracy will appear like a sick man's dream. At the same time, I am not insensible to the fact that the democratic principle is so prevailing in our government, and its natural tendencies so strong, to an increase of power, that I am not less sensible of the necessity of keep-

ing a watchful eye upon it than upon the other branches of the government. Our system is indeed in strict truth a democracy, but we hope and believe it to be a restricted democracy;—restricted not only by the representative principle, but by various causes having their foundation, not in the form of the government, but in matters extrinsic of its organization.

In considering our institutions as democratic, I am distinctly sustained by the most profound political thinker of the present day. "In America," says De Tocqueville, p. 153, "the people appoints the legislative and the executive power, and furnishes the jurors who punish all offences against the laws. The American institutions are democratic, not only in their principle but in all their consequences; and the people elects its representatives *directly*, and for the most part *annually*, in order to insure their dependence. The people is therefore the real directing power; and although the form of government is representative, it is evident that the opinions, the prejudices, the interests, and even the passions of the community are hindered by no durable obstacles from exercising a perpetual influence on society. In the United States the majority governs in the name of the people, as is the case in all the countries in which the people is supreme. This majority is principally composed of peaceable citizens, who, either by inclination or by interest, are sincerely desirous of the welfare of their country. But they are surrounded by the incessant agitation of parties, which attempt to gain their co-operation and to avail themselves of their support."

If our government then be essentially a democracy, it is peculiarly our business to guard against the defects and mischiefs incident to that form of government. Of aristocracy, I am persuaded we can never be in danger, (De Tocqueville, p. 400,) and

the character of our institutions affords us, I think, every reasonable security against the establishment of a monarchical government either upon the basis of our present constitution or through the instrumentality of revolution.—See Fed. No. 28, as to the obstacles to usurpation offered by the extent of our country and the division into states. But the democratical spirit *may* grow even under the existing frame of government to a pernicious height, and it demands therefore the watchful vigilance of every wise patriot to keep it within its proper bounds ; for

“ Eternal vigilance is the price of liberty.”

Let us proceed, however, to the consideration of those regards in which a democracy is defective and endeavor to discover how far its deficiencies are counteracted by the existing state of things in the United States of America.

The first defect of a democracy is its want of that strength and vigor which a monarchy has been supposed to possess for the protection of the state against foreign aggression.—De Tocqueville, pp. 142 208. The unity or centralization of power is unquestionably of infinite importance in the conduct of military affairs, and in carrying on wars whether of aggression or of defence. This unity of power, this vigor and promptness of decision and of action, this capacity of seizing at will upon the resources of the nation and of pressing, without objection, the citizen into the service, which the exigencies of warfare may occasion, it is obvious is incompatible with the very nature of the action of a pure democracy. There, every measure must be discussed, every supply must be voted, every soldier or seaman must be raised by the suffrages of the people. There, the plan of a campaign must undergo scrutiny, and the commanders of the armies must receive authority from the mass. But these evils are in a great degree parried by the character of our representative

democracy. The representative body is not too large very promptly to dispose of all questions of supplies whether of money or men, and the conduct of military operations is in the hands of the executive and of officers appointed and removed by it. It is true that experience has proved even a government like ours, far less efficient in war than an absolute monarchy, wielded by the hand of a Napoleon ; and it may, perhaps, very truly be confessed, that without a sacrifice of freedom, the tremendous energy of absolutism can never be attained. Yet we are not without consolation when we look back upon the wars of the revolution and of 1812, both of which were waged with much success against a powerful foe ; and we have, moreover, many other important and cheering considerations in relation to our capacity to maintain our independence among the nations of the earth.

In the first place let it be observed, that we are separated from all the powerful nations of the world by an ocean of three thousand miles. The nations of Europe can never be formidable to the American confederacy in continental wars.—See Fed. No. 8. It would be very difficult for any European nation to transport and maintain in America more than 25,000 soldiers : an army which may be considered to represent a nation of 2,000,000 of men. The most populous people of the eastern continent contending in this way against the union is in the position then of a nation of 2,000,000 of inhabitants at war with one of 15,000,000. Add to this that America has all its resources within its reach, whilst the European would be at three thousand miles distant from his ; and that the immensity of the American continent would of itself present not only an insurmountable obstacle to its conquest,” but the most serious difficulties in every military operation. The largest armies could never make progress over a continent stretching from New Orleans to Passa-

maquoddy, and from the atlantic to the rocky mountains. They might be conquered even by retreating. The Fabian tactics would overthrow them, and the attempt to hold what they got would subdivide and annihilate them. Their march would be like the passage of a fish through the sea or a bird through the air. The elements would close up around them. There is no centralization here, the subduing of which, would result in the subjugation of the nation. Had Napoleon made himself master of London, the seat of the British government, he might have shaken the British power in its centre, but the possession by an enemy of New York or New Orleans, of Boston or Philadelphia, could have no effect upon Baltimore or Richmond, on Cincinnati or St. Louis. The foe must conquer all and garrison as he goes, and thus divided, must dwindle into insignificance. The nations of Europe have sagacity enough to see this, and we may therefore dismiss the fear of continental wars, except possibly on the flanks of the union with the British in Canada, or at some future day with Mexico and her provinces. To a maritime war, it is true, occasion may give rise. But there is always "greater facility and less danger in supporting a maritime than a continental war. Maritime warfare is not only not dangerous to the liberties of the nation, but it has the advantage of requiring only one species of effort. A commercial people which will furnish the funds, may always have a marine and a fleet. And it has been said, "to be far easier to induce a nation to part with its money almost unconsciously, than to reconcile it to sacrificing of men and to personal efforts. Moreover, defeat by sea rarely compromises the existence or independence of a people."

But if it were even probable that military strength would with us be needed for continental wars, our extensive and fertile country, and its population growing with a rapidity unparalleled in the history

of the world, would leave no fears of a deficiency of men or money for carrying them on; so that I think we may console ourselves with the assurance that we are not amenable to the charge which may so justly be brought against a petty democracy, of inability to sustain itself against the inroads and the domination of a foreign power.

But though it is easy to remove the objections to our representative government in relation to its foreign intercourse, we shall perhaps find more difficulty when we come to consider the operation of the democratic principle on our internal concerns. The most vital objection to democracy is its tendency to faction, to tumult, to political change, and to fall at last into the hands of some ambitious usurper. These are indeed very serious effects, and are too firmly supported as to pure democracies by the pages of history to admit of a denial. But there is still much reason to hope, that there are various causes arising out of the circumstances in which we are placed, not less than out of the character of our representative and federative systems, which will contribute to protect us in a great degree from these alarming mischiefs.

It is not to be denied, that though the forms of a *pure* democracy do not exist among us, though the people do not assemble *plenis comitiis*, and consult upon public affairs, though the government is administered through all its departments by means of representation, yet the American institutions are deeply imbued with the spirit of democracy, and the American counsels are ever inspired by the popular sentiment in the conduct of affairs. "Though the form of government is representative," says the sagacious De Tocqueville, "it is evident that the *opinions*, the *prejudices*, the *interests*, and even the *passions* of the community are hindered by no durable obstacles from exercising a perpetual influence on society." How then are the effects of the *infu-*

sion of these prejudices and passions into the councils of the nation, to be neutralized and rendered harmless?

In the first place, I think we may fairly assume that there is less danger of their prevailing to a dangerous excess in a legislative body composed of not more than 200 members than in a tumultuary assemblage of thousands of the people. However animated by the sentiments, the prejudices and the passions of their constituents, the representatives are not likely, in so small a body, to have their passions as far excited as those of the people would be in their primary assemblies. Moreover, the forms of parliamentary proceeding, the protracted discussions, the decision, first in committee of the whole and afterwards in the house, the necessity of the concurrence of the two houses, and of the subsequent acquiescence of the executive, are all calculated to check the predominance of sudden passion or reckless and headstrong self-will in the adoption of measures.

It is indeed with the deepest regret that I feel in candor bound to acknowledge that practical results have not always corresponded with these theoretical speculations. The intemperance, the disorder, the violent passions, the rude and offensive conduct of members upon the floor of the house of representatives, are all calculated to awaken the most alarming fears for the success of our institutions. But they make it the more necessary to impress upon you—the future legislators of the land—the solemn duty of maintaining the calm dignity and the respectful decorum which ought ever to prevail in the great deliberative assembly of the nation. When Brennus the Gaul, with his conquering legions, entered the senate house of Rome, the elevation and dignity of the senators, even in that fearful moment, impressed the awe-struck barbarian with a belief that it was an assembly of the gods! I very much fear that

the late disgraceful scenes—enacted in the presence, it is said, of a late member of the British parliament—have left an impression upon *his* mind of a character altogether opposite. Let us not despair however. These evils have a tendency to cure themselves; and moreover the general disgust which they have inspired, consoles us with the assurance that the great body of the nation is uncontaminated by the censurable deportment of a portion of its representatives, and is justly resentful at the tame and passive acquiescence of the rest.

But notwithstanding these disgraceful scenes which too often degrade the hall of representatives, the calm and attentive observer must perceive that they have very little reaction upon the body of the people. They can produce no serious conflict or collision among the constituency, because they are scattered over so wide a continent that there are often no touching points between them, by reason of their remoteness from each other. Suppose the matter in discussion sectional;—abolition for instance. If ten thousand abolitionists and ten thousand slaveholders were to meet upon a plain to discuss their points of difference, they would not part most probably without a tumult. Bloodshed and civil commotion would be the probable consequence. But happily for us, all the abolitionists are in the north and the slaveholders in the south, and they never can come together. Their representatives indeed may squabble, but a war of words on the floor of congress is a far less evil than a war upon the plain of “man and steel, the soldier and the sword.” Suppose, however, the topics of interest are *not* sectional: suppose they divide every city, every village, every hamlet, every county. Even then, our wide-spread territory is our salvation. As a victory gained by a party in one quarter is not decisive of the contest, there are no incitements to that violence which so naturally prevails in democratic assemblies.

If the people of New Orleans could govern the union by their votes, there might be a motive for obtaining *per fas et nefas*, by fraud or violence, a victory at an election. But in every distinct district or section of the union, it is well understood that nothing will be gained by a tumultuary course there, and though occasionally such scenes are enacted, they have no effect upon the public mind, except to give rise to sentiments of disapprobation and disgust. I am therefore persuaded that we have less danger in the United States of civil commotion than exists in any other part of the world. To this opinion I am the more decidedly inclined from various other considerations to which I cannot more than briefly allude. Our security from these disturbances which occasionally agitate all other communities except those exhibiting under oriental despotism "the waveless calm the slumber of the the dead," is essentially promoted not only by the extent of our territory, but by the thinness of our population. Where the population is sparse, there is little opportunity for the collection of masses or the creation of excitement. Where the grains of powder are not in contact there is never danger of explosion. There is moreover little temptation to violence, which, however it may effect a particular assembly, can have little influence on distant portions of the community; and lastly, little mischief can arise from these partial disturbances, which are only felt in that remote corner of the nation where they happen to occur. It is of vast importance too, that from the immense and fertile territories which open to our people in the west, there can never be, for centuries, that real suffering for want of the means of subsistence, which is the great exciting cause of many of the riots and excesses which prevail in some of the finest countries of Europe. England and Ireland are in a state of insurrection and rebellion whenever the crops are cut short by unfavorable

seasons, and the revolution of France, which well nigh upturned all the governments around it, as well as its own, received its first most fatal impulses from a starving population. The train was indeed laid by other causes; the explosive materials had been collected in abundance, tyranny may have created the combustibles, but famine applied the match. No such state of things can exist with us. The means of obtaining sustenance and even comfort is so much within every man's power, the facility of migration to our back countries, where land, and meat and bread, and fuel are in profuse abundance, is so great, that there is little danger that we or our children or our children's children even to the third and fourth generation shall ever be the unhappy witnesses of riots or revolutions occasioned by a desperate and starving population. Moreover, the like causes will most probably contribute successfully to prevent the dissemination of those agrarian principles, which tramples on the rights of property under the false pretence of promoting the liberty and equality of the people. The beautiful and fertile plains which lie beyond our mountains, are open to every adventurer, and offer him a home and an asylum without resorting to legalized robbery and pillage. Such is every system of agrarianism. They violate that principle of equality which they profess to revere, when they take from me the fair accumulation of the earnings of my talents, my care and my industry and bestow them upon the indolent, the reckless and the dissolute. Resist, I pray you, through life, by reason, by argument, by the influence and authority you may acquire on the great theatre of action, every effort for the introduction of a principle as deadly in its effects upon the prosperity and happiness of society, as the aspick's poison to the life of man.

Intimately connected with this subject, is the protection and security of the rights of persons and of property. It has been one of the reproaches of pure

democracy, that these are too little respected in assemblies of the people; but with us, there is reason to hope that the deviations from the rule of right in this regard, will be few and far between. The facility of accumulation, and the very large proportion of our society who are in the enjoyment of a competence, has the necessary effect of inducing a general respect for the right of property, and the steadfast purpose of defending it. De Tocqueville has somewhere remarked upon the general predominance in the United States of the desire of accumulation; and as nothing herein is more necessary to success than the security of acquisition, so nothing is more general among us than respect for the rights of property. Occasional and partial excesses have occurred indeed, in populous places, very much to the disgrace of those concerned, and to the deep regret of every sensible and reflecting man. The destruction of private property and the violation of the person by mobs, sometimes even under the impulse of strong indignation against vice, deserve and meet with the execration of every virtuous person and every sincere lover of free government; since this contempt of public authority, this taking of the law into their own hands, this sacrifice of life and property without judge or jury, is very naturally a subject of reproach and makes us a bye-word with other nations of the earth. Let me again impress upon you, my young friends, the solemn duty which rests on you to hold up all such violence as calculated to overthrow, by bringing into disrepute, our free institutions. *Obsta principiis.* Oppose the very beginnings of these fatal mischiefs. Let not the *guilt* of the victims of popular fury be ever pleaded as its justification. Let not acquittals by the false leniency of juries, or the strained technicalities of the bar or the bench, be an excuse for an outrage upon the fundamental principles of all government. Better that a thousand acquitted felons

and desperadoes should be turned loose upon society, than that the fatal precedent should be admitted of a mob sitting in judgment upon the citizen, and dealing death and devastation according to their wild and unregulated discretion. That fatal precedent if it be not checked, will, sooner or later, prove an instrument of destruction in the hands of an infuriate populace for an obnoxious patriotism and uncompromising virtue.

One of the most fruitful sources of disorder in governments of the people must always be the accumulation of colossal fortunes in the hands of an extensive class, and the existence of squalid poverty among the great bulk of the community. Out of this gross inequality, arises those heart burnings and jealousies which give rise to *oppressive* laws, if the power is in the hands of the wealthy, and to *unjust* ones, if it be in the hands of the poor. Classes marked out and thus distinguished, are antagonizing to each other, and their acts are correspondent. Thus in England, where the noble, and the landholder, and the capitalist hold, in reality, the reins of the government, the poorer classes are oppressed by corn laws and innumerable vexatious regulations; while in the ancient democracies on the other hand, agrarian and sumptuary laws were enacted to the prejudice of the rich. Thus, "when the rich alone govern, the interest of the poor is always endangered; and when the poor make the laws, that of the rich incurs very serious risks." Hence, the real friend of his country may well unite in the prayer of Agur, "Lord, give us neither poverty nor riches," for the happy mean in this as in all things else, is best for man. Colossal fortunes disarm even democracy itself of all its power; and the democratical principles of the British constitution though in outward shew so much increased, are paralyzed and nerveless through the influence of the noble, the landholder, and the capitalist—by corruption at the

polls. The ballot is now beginning to be looked to, as the only successful method of counteraction.

Happily for us, this state of things can never take place here. The foundations of the English aristocracy and of the vast distinctions between the different classes of society was laid in feudal times, when the Norman barons were invested with immense possessions by their lord the king. These have been kept up among other things, by the law of primogeniture and the intermarriage of the branches of wealthy families with each other. But with us there is a comparative equality of condition; and even the few large estates, which are from time to time accumulated among us, are broken up and subdivided in one or two generations by the equal division of property among the children of the proprietor and his children's children. Hence, the present self-complacent holder of a principality may through the vista of the future, see his descendant at the plough or seated in the workshop, making a coat for the grandson of his tailor. So true is this with us, that the American sage, whose knowledge of human life and whose native sagacity entitles him to rank with the sages of antiquity, has reduced it to a proverb. "He who begins," says Dr. Franklin, "where his father ends, generally ends where his father began." The child of wealth dies in a jail, the child of poverty expires in the bed of luxury. The consequence is, first, that all of us in making laws to operate on posterity, are governed by the most perfect *bona fides* in legislating for the general good; since he who would countenance oppression in our legislation, can never be assured that his own seed will escape the ills that he is preparing for others. Secondly: There are few so rich as to be able to corrupt the electoral vote, and few so poor as to be corrupted. The instances of both are too rare to permit a fear, that the popular voice is not in the main a fair representation of the popular will—whereas

in England, notwithstanding the extension of electoral suffrage, there is too much reason to believe that a very large proportion of the new electors vote under dictation of landlords or of patrons.

There is another feature of pure democracy with which it is reproached. It is the love of *change*: the restless spirit which never can be contented; the fretfulness of which, never can be satisfied, because it is always looking for that perfection which is confessedly unattainable in human affairs. Perhaps when this charge is made against democracy, even our withers may not be unwrung. There is with us, perhaps, too much impatience at the occasional imperfect working of our great machine. Some think it would be better for a wheel more or less; and some think it has too much, and others too little lever. But the wise among us believe, with the sages of the revolution, that it is better to endure while evils are tolerable, than capriciously to change our system for every trivial cause. They admit that prudence dictates that governments long established, should not be changed for light and trivial causes. To a certain extent, at least,

'Tis better to endure the ills we have,
Than hazard those we know not of.

Fortunately too for us, our system of written constitutions is eminently calculated to protect us from rash and unreflected changes of the fundamental law. By its provisions, the difficulties in the way of amendments, the large majority required to effect a change, the dispersed position of the states, their consequent want of concert, to say nothing of the opposite opinions which are so likely to prevail at the remote extremities of a continent, all tend to allay the statesman's apprehensions of unnecessary and precipitate alterations. In our state constitution there is no provision whatever for amendment, and none can be adopted in the federal constitution without passing the severe ordeal of two-thirds of

both houses of congress, and three-fourths of the legislatures of the states.

In these remarks I have not had an eye to the federative character of our government, from which some have anticipated the evils of convulsion and revolution. For my own part, there is no feature in our system which I look upon with more satisfaction. It is that which enables us to extend our association over so large a territory, without the necessity of centralization, or of vesting inordinate powers in the hands of government to enable it to wield and manage the immense machine. It is that which enables us to command the wealth and population which is essential for national defence, without exposing us to the danger of absolutism, which has throughout the world been so generally the result of extended empire of consolidated character. The division of powers between the state and federal governments has the effect of lessening power in the hands of each, while there is no diminution of the *aggregate* powers essential for the conduct of affairs. The federal government is largely invested with all those powers which are essential for foreign intercourse, and against foreign aggression. But that government can never penetrate into the privacy of individual interests, which, after all, is one of the most fearful actions of tyrannical governments. These are under the control of the states which form the barrier between the homestead of the citizen and the action of the general government; while on the other hand, they have themselves no temptations to invade the rights of the people, and no inducements to seize upon the limited sovereignty of the states, since that sovereignty is shorn of all its principal attractions, by the powers which are transferred to the general government.

It is indeed most grateful to consider in what various modes this ingenious mechanism is calculated to effect the most salutary purposes. Postponing

for the present the question of the danger of consolidation and absolutism in the general government, let us here observe how perfect is the protection our system affords, against an aristocracy or an usurpation of the powers of the states. As to aristocracy, the materials for it have no existence, and it may well be doubted whether it could be now created even if the government were consolidated. But in our confederate character it is impossible. An aristocracy for the *union* cannot be, for if there were no other difficulty, the different states could never agree as to the relative rank of their grandees; and the derangement of any one state would effectually defeat the whole. So that not only is such an aristocracy impracticable under the present constitution, but it is also impracticable that it should be ever introduced by amendment while the union lasts. And as to the states themselves, even if the constitution did not guarantee a republican form of government, the state power is so little dazzling, compared with that of the general government as to be unworthy of usurpation. A Virginia duke would have little reason to pride himself on a star and garter either in the senate or house of representatives, and the arena of the legislature of the state would be too humble a theatre for the display of his rank or the exhibition of his arrogance and vainglory. The dangers of aristocracy, therefore, while the general features of our confederation last, may safely be set down among the dreams of those gloomy and visionary predictors who see nothing but calamity in the destiny of the nation.

To the effect of this separation of powers, De Tocqueville attributes the most prevailing influence, page 252: "If," says he, "the directing power of the American communities had both these instruments of government at its disposal, and united the habit of executing its own commands, to the right of commanding; if, after having established the general princi-

ples of government, it descends to the details of public business ; and if, having regulated the great interests of the country, it would penetrate into the privacy of individual interest, freedom would soon be banished from the New World.

“ But in the United States the majority which so frequently displays the tastes and the propensities of a despot, is still destitute of the more perfect instruments of tyranny.

“ In the American republics the activity of the central government has never as yet been extended beyond a limited number of objects sufficiently prominent to call forth its attention. The secondary affairs of society have never been regulated by its authority ; and nothing has hitherto betrayed its desire of interfering in them. The majority is become more and more absolute, but it has not increased the prerogatives of the central government ; those great prerogatives have been confined to a certain sphere ; and although the despotism of the majority may be galling upon one point, it cannot be said to extend to all. However the predominant party in the nation may be carried away by its passions ; however ardent it may be in the pursuit of its projects, it cannot oblige all the citizens to comply with its desires in the same manner, and at the same time throughout the country. When the central government which represents that majority has issued a decree, it must entrust the execution of its will to agents, over whom it frequently has no control, and whom it cannot perpetually direct. The townships, municipal bodies, and counties may therefore be looked upon as concealed break-waters which check or part the tide of popular excitement. If an oppressive law were passed, the liberties of the people would still be protected by the means by which that law would be put in execution : the majority cannot descend to the details, and (as I will venture to style them,) the puerilities of administra-

tive tyranny. Nor does the people entertain that full consciousness of its authority, which would prompt it to interfere in these matters ; it knows the extent of its natural powers, but it is unacquainted with the increased resources which the art of government might furnish.

“ This point deserves attention ; for if a democratic republic, similar to that of the United States, were ever founded in a country where the power of a single individual had previously subsisted, and the effects of a centralized administration had sunk deep into the habits and the laws of the people, I do not hesitate to assert, that in that country a more insufferable despotism would prevail than any which now exists in the absolute monarchies of Europe ; or indeed than any which could be found on this side the confines of Asia.”

“ It profits a people but little to be affluent and free, if it is perpetually exposed to be pillaged or subjugated ; the number of manufactures and the extent of its commerce are of small advantage, if another nation has the empire of the seas and gives the law in all the markets of the globe. Small nations are often impoverished, not because they are small, but because they are weak ; and great empires prosper less because they are great than because they are strong. Physical strength is therefore one of the first conditions of the happiness and even of the existence of nations. Hence it occurs, that unless very peculiar circumstances intervene, small nations are always united to large empires in the end, either by force or by their own consent ; yet I am unacquainted with a more deplorable spectacle than that of a people unable either to defend or to maintain its independence. De Tocqueville, 142.

“ The federal system was created with the intention of combining the different advantages which result from the greater and the lesser extent of nations ; and a single glance over the United States of

America suffices to discover the advantages which they have derived from its adoption.

“In great centralized nations the legislator is obliged to impart a character of uniformity to the laws, which does not always suit the diversity of customs and of districts ; as he takes no cognizance of special cases, he can only proceed upon general principles ; and the population is obliged to conform to the exigencies of the legislation, since the legislation cannot adapt itself to the exigencies and customs of the population ; which is the cause of endless trouble and misery. This disadvantage does not exist in confederations ; congress regulates the principal measures of the national government, and all the details of the administration are reserved to the provincial legislatures. It is impossible to imagine how much this division of sovereignty contributes to the well-being of each of the states which compose the union. In these small communities which are never agitated by the desire of aggrandizement or the cares of self-defence, all public authority and private energy is employed in internal amelioration. The central government of each state, which is in immediate juxtaposition to the citizens, is daily apprised of the wants which arise in society ; and new projects are proposed every year, which are discussed either at town-meetings or by the legislature of the state, and which are transmitted by the press to stimulate the zeal and to excite the interest of the citizens. This spirit of amelioration is constantly alive in the American republics, without compromising their tranquillity ; the ambition of power yields to the less refined and less dangerous love of comfort. It is generally believed in America that the existence and the permanence of the republican form of government in the new world depend upon the existence and the permanence of the federal system ; and it is not unusual to attribute a large share of the misfortunes which have befallen the

new states of South America to the injudicious erection of great republics, instead of a divided and confederate sovereignty.

"It is incontestibly true that the love and the habits of republican government in the United States were engendered in the townships and in the provincial assemblies. In a small state, like that of Connecticut for instance, where cutting a canal or laying down a road is a momentous political question, where the state has no army to pay and no wars to carry on, and where much wealth and much honor cannot be bestowed upon the chief citizens, no form of government can be more natural or more appropriate than that of a republic. But it is this same republican spirit, it is these manners and customs of a free people, which are engendered and nurtured in the different states, to be afterwards applied to the country at large. The public spirit of the union is, so to speak, nothing more than an abstract of the patriotic zeal of the provinces. Every citizen of the United States transfuses his attachment to his little republic into the common store of American patriotism. In defending the union, he defends the increasing prosperity of his own district, the right of conducting its affairs, and the hope of causing measures of improvement to be adopted which may be favorable to his own interests; and these are motives which are wont to stir men more readily than the general interests of the country and the glory of the nation.

"On the other hand, if the temper and the manners of the inhabitants especially fitted them to promote the welfare of a great republic, the federal system smoothed the obstacles which they might have encountered. The confederation of all the American states presents none of the ordinary disadvantages resulting from great agglomerations of men. *The union is a great republic in extent but the paucity of objects* for which its government provides assimi-

lates it to a small state. Its acts are important, but they are rare. As the sovereignty of the union is limited and incomplete, its exercise is not incompatible with liberty; for it does not excite those insatiable desires of fame and power which have proved so fatal to great republics. As there is no *common centre to, the country*, vast capital cities, colossal wealth, abject poverty, and sudden revolutions are alike unknown; and political passion, instead of spreading over the land like a torrent of desolation, spends its strength against the interests and the individual passions of every state.

“Nevertheless, all commodities and ideas circulate throughout the union as freely as in a country inhabited by one people. Nothing checks the spirit of enterprise. The government avails itself of the assistance of all who have talents or knowledge to serve it. Within the frontiers of the union the profoundest peace prevails, as within the heart of some great empire; abroad, it ranks with the most powerful nations of the earth: two thousand miles of coast are open to the commerce of the world; and as it possesses the keys of the globe, its flag is respected in the most remote seas. The union is as happy and as free as a small people, and as glorious and as strong as a great nation.”

“No one can be more inclined than I am myself to appreciate the advantages of the federal system, which I hold to be one of the combinations most favorable to the prosperity and freedom of man. I envy the lot of those nations which have been enabled to adopt it; but I cannot believe that any confederate peoples could maintain a long or an equal contest with a nation of similar strength in which the government should be centralized. A people which should divide its sovereignty into fractional powers, in the presence of the great military monarchies of Europe, would in my opinion, by that very act, abdicate its power, and perhaps its existence

and its name. But such is the admirable position of the new world, that man has no other enemy than himself; and that in order to be happy and to be free, it suffices to seek the gifts of prosperity and the knowledge of freedom."

In my desire to present these striking views of the effects of our federal system, I have deviated somewhat from the particular point which I had been engaged in illustrating. That point was the probable security of our representative and federative system from the dangers of internal commotion, and the checks to those dangers which are presented by our situation and circumstances, as well as by the nature of our government and institutions.

In returning to the consideration of this topic however, one of the most interesting questions relates to the action of the states themselves in their sovereign capacities. I will before I proceed, read to you De Tocqueville, pp. 146 and 147, and from 362 to 401.

I have thus laid before you, young gentlemen, the strong and sagacious views of our federative institutions and of their operation and probable duration, from the pen of a young man not exceeding twenty-five years of age when he travelled in America. His speculations have deservedly extorted the admiration and applause of the most sagacious statesmen, on both sides of the Atlantic, and are throughout most worthy of diligent examination. It may seem superfluous after his very forcible reflections to add any remarks of my own upon the same topics. Yet I must beg leave to pursue somewhat farther the question of the tendencies of the union to centralization on the one hand, or dismemberment on the other, and the various and powerful causes, which tend to counteract and to restrain these pernicious tendencies.

Of centralization or consolidation as it is usually termed by us, I entertain but little apprehensions, I

confess, unless we should be unfortunately engaged in wars which threaten our subjugation, and call for the united efforts of the nation in the most efficient form. Consolidation can only be effected, first, by usurpation ; second, by changes of the constitution, to which the states shall assent for their own annihilation ; third, by subjugation by overgrown members of the union ; fourth, by combination of sectional divisions of the residue of the states. The danger of the usurpation of the government by an ambitious individual appears to me to be an idle dream, unless we should be involved in desolating wars, which too often result in investing dictatorial powers in the hands of one man. I have already adverted to the little hazard we incur of dangerous wars ; to the consequent want of pretext for raising standing armies ; to the probability, in our present circumstances, that the navy will be the arm of defence of the nation, and to the certainty that our liberties never can be conquered by it. From these considerations, the probability is remote of our training up military chieftains to our destruction, and still less of our supplying them with mercenary troops, to secure the great object of their criminal ambition. That very extent of our country too, to which I have so often adverted, and the existence of six and twenty organized governments, each acting upon its own impulses, furnish the best security against any attempt upon our liberties. The usurper would encounter all the difficulties already portrayed, in the attempt to overrun and subjugate a continent. Moreover at the sound of the tocsin, every non-forming state would be on the alert. Naturally jealous of the inroads of power, and seeing the constitution trampled under foot, they would at once prepare for their own security and combine for their defence. In such emergency, they would *indeed* be thrown back upon their reserved rights. It would offer no question of abstractions, it would present no

moot point to be discussed in coterics, or decided in political clubs. The constitution would be trampled under foot, its bonds torn asunder, and the states disenthralled. The government itself would be dissolved, by the withdrawal from either house of a majority of its members, if a majority of the states whether great or small resisted the usurper, and by this simple operation, the sinews of his power be cut and his arm rendered nerveless and impotent. This is indeed a feature in our constitution, which seems to have been but little adverted to, though in the course of events it may possibly prove to be very striking and important. A union of thirteen small states may checkmate the government by withdrawing their senators and annihilating the senate! and the five large states of New York, Pennsylvania, Virginia, Ohio and Massachusetts could effect a similar result, by refusing to elect representatives. He, therefore, by whom our liberties are cloven down, must effect his object by prostrating the constitution, and marching to power by means having no semblance of law, or he must have the good fortune to secure to himself a majority of states, and among them of those, who have a majority of the representatives.

From these and various other considerations, I am persuaded we incur but little hazard of centralization from usurpation. If indeed our union be broken up by the states, and separate confederacies be established, and still more if each state sets up for itself, we may fairly expect all the mischiefs of tyranny and absolutism sooner or later to visit this now happy people. But while the union lasts and its general principles are even in the main preserved, I cannot fear that the feeble magistrate at the head of the government can ever grow up into a stern and ruthless tyrant. The patronage so much talked of and so properly guarded against, never can be great enough to give him dangerous strength, while the great mass of the concerns of the nation are managed by the

states, and the agents for conducting them, are their own ministers and servants. As De Tocqueville very truly remarks, *the states are the peculiar objects of the affections of their respective people*, and all the feared and boasted patronage of the federal government, will probably ever prove ineffectual to corrupt the pure current of this natural and patriotic feeling. See De Tocqueville, 147, 148.

To prevent misapprehension however, it is proper here to remark, that in expressing the opinion that so long as we remain united we shall not incur the hazard of usurpation or of centralism, I by no means intend to be understood, that there are no dangers in our government of abuse of power. Far, very far from it. So long as it is true, that the heart of man is prone to evil and most desperately wicked, so long must it continue true, that the people and the states will be exposed to inroads upon their rights, by those who hold the power. The tyranny of majorities may be felt under the forms of the best constitution, and the insidious encroachments of the executive power, and the corrupt abuse of the patronage it enjoys, are perhaps not less to be expected under this, than under other systems of government. On these topics it will be necessary to enlarge hereafter, and they are only mentioned here, to afford opportunity for the remark that the mischiefs to which they refer are indeed to be deprecated, and ought to be steadfastly resisted, but that under our happy constitution there is little reason to apprehend they can be fatal. There is a line beyond which they cannot pass ; there is a limit to the duration of office both in the legislative and executive departments, which serves to check them, while the total *bouleversement* of the ruling party and the promotion of their adversaries, destroys all their airy visions of enlarged dominion, and leaves them in the shades of private life, to lament the dangerous power built up for another. The late experience of the nation proves, that with all his patron-

age a president may find himself on a re-election in a powerful minority ; as the events of forty years ago indeed had fully shewn, in the total overthrow of the elder Adams, though sustained confessedly by a powerful party of very great ability. And let the incumbents in office try it when they will, they will find every inroad they make upon the constitution, magnified into an importance, and trumpeted through the land, with a diligence and success, altogether fatal to their hopes. The states will be peculiarly sensitive. They will be ever ready to "augur maladministration at a distance and scent the approach of tyranny in every tainted breeze." The *quietus* of Mr. Adams was thus found in the sedition law, and Mr. Poinsett's militia bill sealed the fate of Mr. Van Buren ; while "the stocked pack" which, it was insisted, elected the younger Adams,* was unquestionably one of the prominent topics in the animated canvass that terminated in his defeat. These are salutary correctives of vaulting ambition, and I trust they will ever be unsparingly applied ; as they will ever contribute most effectually to arrest the encroachments upon the rights of the people and the states ; which unobserved might become mischievous, and lead to discontents and jars between the states and federal government that might end in dissolution.

2. The second mode in which consolidation may be effected is by changes of the constitution with the assent of the states by which they will gradually effect their own annihilation. But when we reflect upon the character of the human heart, and moreover call to mind the extreme difficulty of procuring the adoption of any amendment to the constitution,† there can surely be no probable ground of apprehension, of eighteen states consenting to disrobe them-

* I do not mean to intimate an opinion either way on that matter. If there was no foundation for the charge it proves but the more strongly the jealousy of the people.

† These difficulties are strongly presented as to other matters in the "Federalist, p. 84.

themselves of all their power and subjugating themselves and their sister states to the government of a central power. I shall therefore without further remark proceed to the third and fourth considerations.

3 and 4. Is there reason to apprehend a subjugation of one section of the union, by another, or by a combination of states wielding by their weight and influence the powers of the union? The last of these is in some lights a question of the deepest interest, and may grow into fearful magnitude if the public councils should prove deficient in wisdom, moderation and virtue.* It involves the consideration moreover of one of the most difficult and interesting problems in the science of government. It seems to be the insoluble problem, of a thing being, at the same time, greater and less; of power being at the same time, superior and inferior; of the sovereignty being, at the same time omnipotent and yet controllable. These contradictions which present difficulties in all forms of government are not less likely to arise in a representative democracy than in any other political system. In monarchies if the king has unlimited authority, a tyranny is the result; in aristocracies, if the nobles are sufficiently powerful to sustain themselves, their power proceeds by regular accretions, until they are absolute; and if in either case to prevent these evils an adequate check is placed in the third estate, or in the people, that check will sooner or later be destroyed or become the master spirits.

And so it is with a democracy. The fundamental principle of that form of government, whether pure or representative, is the sovereignty of the people; and the will of that sovereignty is always declared by the

* As to the notion of an attempt at subjugation by any one state while the union lasts, it is altogether visionary; for its first movement would array the rest of the union against it. Divide indeed into separate states, or separate confederacies, and subjugation will soon become the fate of the feeble powers. Union only can protect the weak and chain the towering ambition of the strong.

majority. It does not follow indeed that what it does is *right*, but, from the very constitution of the system, it does follow, that the will of the majority must prevail. It could not be otherwise, upon the principle of equality, than that the greater number should rule, since unanimity is impossible. The greater or the less must predominate; and to make the *less* predominate over the *greater*, would yet more violate right and justice, while nothing would be gained in policy, since it is just as probable, and indeed more probable, that the few should err than the many. As however the majority *may err*, and what is yet more important, as they *may tyrannize*, it is a momentous question how to restrain it within proper bounds without impairing those rights which are conceded to belong to it.

Upon this interesting subject the remarks of De Tœcqueville are peculiarly striking. I cannot do better than read them at large. See pages 220, 240, 250, 251.

After having presented these striking remarks, which are calculated to impress us strongly with the necessity of vigilance and energy, in preserving our institutions from the mischiefs of domineering majorities, let us endeavor to acquire more distinct ideas of the danger on the one hand and of the practical checks upon the other, on which we may reasonably rely for our security, by considering the matter in a twofold view; first, as to the danger of tyrannical abuse of their power by majorities, where sectional matters are *not* the objects of action; and secondly, when the great subject of conflict between the parties is altogether sectional.

In relation to the first, my fears, I confess, fall very far short of the vaticinations of our sagacious author. The division of power between the states and the federal government, and the checks to be found in both, upon the powers of the majority, forbid the apprehension of mischievous and tyrannical legislation.

The effect of the division of powers, both on the state and federal governments, is to diminish the motives to the domineering of majorities, while it circumscribes also the spheres of their respective actions. The federal government has little power over the internal concerns of the country. It acts but rarely, directly on the people, and is not, therefore, to any considerable extent, capable of tyrannizing over them. The great mass of municipal power is exercised by the states, and their power alone is felt by the people at their homes and firesides. If a majority, therefore, in congress, were disposed to tyranny, it would be difficult for them to find legitimate and constitutional objects of legislation, through which they could oppress the minority.— See De Tocqueville, pp. 365, 6, 143, 144. But if they could, so long as laws are general in their action, they must operate on all—on majorities as well as minorities,—on the very men who pass them, who in the course of one revolving year, may be returned into the mass of the people, to be the wretched victims of their own tyranny and misrule. Although therefore, in the natural course of things, a party in power may be expected to wield its authority so as to keep the reins in their own hands, yet have they no motive to pass tyrannical laws which must affect themselves, and moreover always will result in the downfall of those by whom they are enacted. So too in the states. Though the ramifications of their authority extend through every portion of society, yet as they are shorn of those powers which form the great objects of insatiable ambition, there can be no motive for encroachment on the rights of the people, or for harsh and tyrannical legislation. Their sphere of action is confined to the rights of property, the rights of persons and matters of police, all of which must press equally upon the majority and the minority. Hence it is, that although (as cannot be denied) there are numerous instances of tyranni-

cal action in majorities both in our legislatures and in congress, yet are they to be found (not in acts of general legislation, which alone can be of serious influence) but in the ephemeral concerns of party politics, and the dirty tactics of journalists and demagogues. A president in office may confine his patronage to his suppliant tools, and exclude his opponents from their equal right, as citizens, to participate in the honors and the emoluments of office, and a successful candidate upon receiving the keys of government, may corruptly distribute the spoils of victory. A majority in congress may for a while suppress debate, and carry all its favorite measures by solid phalanx. But after all, experience has shewn, that the great and important rights of public liberty, and the security of the rights of persons and of property, are not disturbed by the agitations, (however alarming) of political parties; and under all the violences we have witnessed, every man has continued to sit unmolested under his own vine and fig-tree, where there is none to make him afraid. Experience has proved, that however strong and able a party in power may be, the exercise of tyrannical legislation inevitably results in their defeat and downfall. The cry that the church is in danger, has overthrown many a ministry in England, and the cry that our liberties are assaulted, has not been less successful here. The alien and sedition laws gave the *coup de grace* to one administration, and an obnoxious militia law sealed the fate of another. In short, though political parties, in their scramble for power, and in their pursuit of the loaves and fishes, are reckless and unprincipled, yet the mass of the people will desert them and throw the majority in the scale of their adversaries, whenever they can be persuaded, that serious inroads are making upon their liberties and the constitution. The interest of the mass must always be the same. The interest of the majority is, and must always be, identified and

confounded with that of their fellow citizens. They may be deceived or they may be mistaken ; but they cannot, in this regard, be faithless and corrupt. A *majority* of the people cannot designedly unite, to promote and sustain the fortunes of those whom they perceive to be warring against the rights and liberties of themselves and their posterity.

But where the question is of sectional concern, the result is more doubtful, and the hazard of tyranny no "coinage of the brain." Where the interests, the feelings or even the prejudices of two different sections of a confederation are distinct and conflicting, where one regards as essential, what the other looks upon as ruinous, and where the line of demarcation is as plain territorially as it unfortunately is in point of interest or opinion, it may be confidently pronounced that the union of the respective portions must speedily be dissolved, unless there be co-existing causes of an opposite tendency more than adequate to control the repellent principles. Take for example, the subject of abolition, which unfortunately now stands forth so prominently on the canvass. All the states north of the Pennsylvania line and of the Ohio river, abjure and reprobate *slavery*. The rest of the states—that is to say—all south of the Pennsylvania line and of the Ohio river, not only tolerate it, but *some* of them deem its existence essential to their prosperity, and *all* of them regard its *abolition* as *fatal to their safety*. Here then is a point of difference of the most momentous consequence to the southern states, and which their northern brethren (with little reason it appears to me) have chosen to consider vitally important also to them. The antagonizing parties are moreover divided by a line, on each side of which, they may be regarded as unanimous. Such a state of things places the two large divisions of the union in dire hostility to each other. They stand in the position of separate nations. They are bound

together in point of form indeed, but in point of fact they are conflicting and distinct. What shall counteract the effect of these conflicting principles? What shall restrain a northern majority from tyrannizing over the southern slaveholder, by the enactment of provisions, and the adoption of measures ruinous (not to their prosperity only) but, as they believe, to their very existence? Nothing but making him pay for the slaves as England has done. If abolition be necessary, why should the south bear the burden alone of the heavy tax of emancipation? Will they agree to pay their proportion of what we lose? It is in this state of things that majorities are chiefly to be dreaded; when they are hurried on, by their separate interests, their excited feelings, or their fanatical prejudices, to enact laws, and adopt measures, *which do not bear upon themselves but upon others only*. It has been keenly and sagaciously remarked "with what *calm philosophy* we can all of us contemplate the misfortunes of *others*"; and it may be as truly said, that there is little safety for a poor minority, where the majority legislates for them alone; enjoying, themselves, the comfortable assurance, that however the minority may suffer, their "own withers will be unwrung." There is no safety for the governed in such a state of things, or rather there is no other safety than in the interests of the majority or in their own strong arm and desperate valor. "If," said Mr. Clay in his speech on the veto power, "a majority of Congress should put itself in opposition to the interests of the south (on the subject of slavery) neither presidents nor *veto*s would avail to protect it. Its own resolution, its own valor, its own indomitable determination to maintain its rights against all men, these and these alone could in that case uphold the southern interests." *Intelligencer* January 25, 1842. And all this is perfectly consistent with the principles of the declaration of Independence, and the views presented heretofore, on the right of resistance

against tyranny and oppression. Ante page 52 &c. Against an omnipotent power, disposed to tyranny, there is no protection except self-defence, and the only restraint upon the tyrant whether *a monarch or a majority*, is the fear of the desperation of its victims.

But is it then to be supposed, that the weaker section of the union must succumb to the tyranny of a majority, when they have a united and powerful population to defend their rights? By no means. Let the time come when it may, and intolerable evil will inevitably throw back the oppressed upon their own resources, and drive the injured states to the sad alternative of dissolution. This powerful truth cannot be concealed, when we look to the principles upon which alone unions can be formed or can be maintained. Community of interest, community of feeling, community of principle, all seem important in connecting together the various links of a confederation of republics. "One of the circumstances," says the author so often quoted, "which most powerfully contribute to support the federal government in America, is that the states have not only similar interests, a common origin and a common tongue, but that they are also arrived at the same stage of civilization, which almost always renders a union feasible. A federal compact cannot be lasting, unless there exists in the communities, which are leagued together, a certain number of inducements to union, which render their common dependence agreeable, and the task of government light. All the peoples which have ever formed a confederation, have been held together by a certain number of common interests, which served as the intellectual ties of the Association." It is not indeed that all must have the *same* pursuits, for that might make the parties rivals instead of friends. But they *must not be hostile in their character*. In so far as they are so, the bond of union is the more feeble. One state therefore may be agricultural another manufacturing and another commercial, and yet all will

but subserve the interests of each other. But where the existence of a state of things, e. g. as of slavery, is interwoven with the very existence of one half the states, and its existence in the confederacy is deemed burdensome to the rest, the seeds of discord are so thickly sown that harmony cannot long be cherished except by the most guarded moderation and forbearance. So too with the tariff, which has been so long the fruitful occasion of wrangling between the statesmen of the north and south. The duties which the north demands, to feed its manufacturers, the south considers as a burden upon its industry; and even at the present moment an angry controversy is apprehended on the subject. What can be said but that the sister states must settle these discordant interests upon the liberal principles, dictated by a sense of the blessings of the union, and of the necessity of mutual forbearance for its preservation. We must learn to "give and take," or it will "dissolve like the baseless fabric of a vision and leave not a wreck behind."

"Meanwhile," says Mr. Clay in the speech already quoted, "the people of the south have all the requisite guarantees. First they have the sacred provisions of the constitution; and then they have the character of our government, as a confederacy; and the fact, of the existence of these interests (the rights of the master over the slave) long before the adoption of the constitution, and the rights and duties of the government in regard to them recognized and laid down by that sacred instrument. That is the security of the south. He felt himself secure in that mutual harmony which it was alike the interest of all to cultivate; in the constitutional securities; in the certainty of the disruption of the union as the inevitable result, the moment that interest should be assailed; and in the capacity and determination of the south to defend herself at all hazards and against all forms of attack whether from abroad or at home."

Such being the imminent hazard to the union of the states, from sectional differences on certain important topics, it behoves us to consider attentively, what counteracting principles are to be found in our institutions, and in the interests of the members of the confederacy, against the tyranny of a majority, in one part of the union, over the minority in another. And the first is undoubtedly to be found in the *guarantee of the constitution*. Every officer of the government, every member of the two houses of congress takes *an oath to support that instrument*. In that oath, wherever (as for example in relation to slavery) the constitution is beyond dispute there is a strong security. If it be even admitted that *some* will violate it, whose fanaticism may persuade them that there is less guilt in the violation than the observance, yet, I am persuaded, that a vast majority of our northern brethren will respect the constitution in this regard, even if they be desirous to change it. The solid phalanx of the south, (the slave states fall short but few in number, and as no change can be made without the consent of three fourths of the states there can be no danger of any *regular, constitutional* change,) sustained by the calm and reflecting in the northern states, will always offer a successful resistance to the schemes of abolition on the floor of congress. And so on other topics of sectional difference. There is much reason to hope moreover from the past, that there will generally be found within the body, a portion of the union, so far disinterested in the local questions which may occasionally arise, as to hold the scales between the contending parties, and to adjust the balance upon fair and equitable principles.

There are however more efficient guarantees for the rights of the respective portions of the union than the sanction of the oath to support the constitution. Unhappily the seductions of interest are oftentimes too strong for the obligations of conscience : or rather

the pliant opinions of the mass of mankind, are too easily moulded into a perfect conformity with what they deem for their personal advantage. So long, however, as the public mind can be preserved in an honest and devoted attachment to the union, even sectional majorities, or the more sober portion of them at least, may be expected to abstain very carefully from any measures which may lead to its dissolution. I do not mean to say that they may not abuse their power. I do not mean to deny that they may not often act oppressively and unjustly. So long as human nature is unchanged that must be apprehended. But I do mean to express the hope that the deep stake which every portion of this confederation have in the continuance of the union, will ever prove sufficient to restrain even a sectional majority from gross and continued abuses; from such abuses as cannot be borne; from such abuses as will throw back the oppressed minority upon their natural rights, to resist at all hazards the encroachments of despotism, under the forms of democracy, and law, and drive them in self defence, to the necessity of dissolution. Extreme cases alone indeed could justify it: but extreme cases might compel it; such as the general emancipation of the slaves of the south, which would place a dagger in the hand of every domestic.

Let us advert then very cursorily to some of the motives, which are calculated to bind the respective portions of our country to the union, and which may safely be relied on as holding back a sectional majority, from an outrage upon the rights of other portions, which might lead to dissolution.

And first, let us take the north. I allude particularly to the manufacturing and commercial states. To them it would seem that the union must be more important than to the south or west. So long as the union continues, they will be the carriers and the manufacturers of the south. Their ships will export our flour, our tobacco and our cotton, and their looms

will clothe our people. Their industry is thus encouraged and paid; and their people are better fed by far than they could be by tillage of their sterile rocks and barren strands. But let the union be dissolved, and their tariff is repealed forever, and their ships will be rotting at their wharves. The looms of England would flood the south with her productions, and her commercial marine would successively compete for its trade, with unfeeling brethren, who had rioted in their power, and trampled upon their rights. Depend upon it, the keen and sagacious statesmen of the north, are well aware of these deep stakes. They know full well that there is a point beyond which, forbearance ceases to be a virtue, and that when that point is transcended, the union will be but a rope of sand. The cool and reflecting of that acute and sagacious people, will throw their weight into the lighter scale, rather than put at hazard their deep interests in the preservation of the union.

Take next the case of the west, who are destined in half a century, if this happy union continues, to fill to overflowing one of the most fertile and beautiful valleys on the habitable globe. It is hemmed in by the Alleghany to the east, and the rocky mountains on the west, and watered by the great father of rivers and his noble tributary streams. But they have but one estuary. *United*, they enjoy that noble outlet for the export of all their superabundant products, while the passes of the mountains and the internal improvements of the atlantic states, afford them easy access to the eastern cities, and convenient routes for transportation to the interior, of foreign and home-made fabrics and productions. They repose in perfect security, and dream of no danger from without and no peril from within. The atlantic states are their broad barrier against attack on the side of the sea, and the shipping manned by their eastern brethren are the natural carriers of all the products of their industry. Separate them by dis-

solution, and they become our masters in their own defence or must ask on the score of courtesy what they now enjoy by right. In the event of war they would be cut off from the world, and their boasted Mississippi would be hermetically sealed by the navies of the east.

Now turn to the south. I am perhaps too much of a southron to see in proper lights that weakness which is attributed to the southern states. I might perhaps, with more propriety, let others speak for me. De Tocqueville remarks, "the inhabitants of the southern states are of all the Americans, those who are most interested in the maintenance of the union: they would assuredly suffer most from being left to themselves." But I should assuredly be under the dominion of the blindest prejudice, if I were to close my eyes to the vastly superior resources and population of the northern states, and to the incubus of slavery which crushes and overwhelms our strength. One half our population can never be our defenders; but intrigue and tampering of northern fanatics, when no longer withheld by the trammels of the constitution and the ties of brotherhood, might make them our deadliest foes. These considerations alone are sufficient to induce every southern man to hug the union to his heart, so long as the constitution is carried out in its fair and proper spirit. The benefits which we derive from it are not so much in having carriers of our produce and manufacturers of our necessary fabrics. These we might have without the aid of our northern brethren by retracing the steps of our forefathers and submitting to be once more tributary to Great Britain, or by entering into unequal treaties with that grasping and ambitious power. But our great advantage is that we escape the ruin, disunion would bring upon us. We escape the danger of desolating wars with those who are now our friends; we escape the necessity of stand-

ing armies, to which neighboring nations not united in confederacy, must sooner or later resort ; we diminish the dangers of servile wars by having auxiliaries provided by the constitution for the suppression of insurrections ; we escape the danger of formidable inroads from the great northern hive whose vastly superior power might, in the language of Mr. Jay, "be often tempted to gather honey in the more blooming fields and milder air of their luxurious and less hardy neighbors ;" we escape the hazard of falling into absolutism, the too common lot of nations whose position subjects them to perpetual collision and strife, and lastly, we escape the burdens and the misery which would fall heavy upon us when our ploughshares and pruning hooks shall of necessity be changed into the sword and the bayonet, and we shall be found in thick array, with glittering arms, opposed to our pristine brothers, with whom in two heroic and glorious wars we successfully fought, shoulder to shoulder, against the enemy of our common liberties. We are loud at the present moment against the fanatics of the north for their mistaken zeal for abolition. What would repress their vile attempts if the shackles of the constitution were stricken from their hands ? What would prevent the success of some Peter the hermit in his attempts to stir up a crusade in the *holy* cause of abolition ? What would restrain misguided multitudes from flocking to his standard and spreading all the horrors of a servile war in these now peaceful and happy states ? With these views of our state and condition, though I do not question the right of a portion of the union to throw off its obligations when it is openly, plainly, and ruinously violated by another portion ; yet I do hold it to be as important to this as to any other part of this confederation that we should submit to evils where evils are tolerable and temporary, or where they may have resulted from false judgment or the delusions

of interest which may be succeeded by juster views rather than venture upon the untried experiment of rival confederations. Mischiefs must be great indeed to justify our calling in disunion as our great catholicon. The times must be truly out of joint before it can safely be affirmed "*Tali auxilio tempus eget.*" Try it when we may, we shall find the remedy worse than the disease, unless some important part of the constitution has been attacked in its recesses, or its vitals been impaired by systematic violation.

I have touched upon these general topics merely to shew how deeply all are interested in the union, and the strong motives which thence arise for forbearance and moderation on the part of those who have the power in their hands lest they destroy by tyrannous exercise, the very source of their authority. I proceed now to another protection against the disposition of sectional majorities, which may occasionally present itself in the administration of the federal government. It is the *veto* power, so much the theme of approbation or censure, according to the exigencies of the moment. I do not mean at this time to enter into the question which now agitates the public mind as to the wisdom of the clause of the constitution which has conferred it. Nor do I mean to affirm that it may not happen that the president may entertain the same sectional views as the majority of congress. But I do mean to say that this may not always be the case,—that it will on the contrary rarely be the case in relation to important matters, and that when the coincidence does not exist, the protection will be effectual. The history of the past will illustrate the two first positions. There has probably never been a president since the foundation of the government, not even the Adams's, who could have been persuaded to sanction a bill for the promotion of the schemes of the fanatical friends of abolition. Washington, Jefferson, Madi-

son, Monroe, Jackson, Van Buren and Tyler would certainly all have negatived a bill for emancipation in the District of Columbia, had it been possible to have found a majority, who would have passed this favorite measure of the abolitionists. This, indeed, results from the simple fact that a president never has, and perhaps never will be elected by a party purely sectional. Every candidate or nominee looks for aid to his cause from every quarter of the union. Parties are more divided upon general politics than on sectional questions, and hence he who succeeds will owe his success to troops of friends in the remotest corners of the states. He has his supporters, not only on Cape Cod and Nantucket, where slavery is an abomination, but in Charleston, Savannah and New Orleans, where it is recognized and even cherished. There his friends and supporters must not be outraged by the heresy of abolition, or they will fall off from his standard. They must therefore be conciliated by a just attention at least to what is due to their peculiar interests and to the constitution. Moreover, geographical causes will conspire to give a preference to those for this high office who occupy the middle portion of the union, and to this cause, perhaps, may in part, be attributed the fact that in fifty-eight years, the presidential chair will have been filled forty-six years by five Virginians and one Tennessean. So long, therefore, as political calculations must rest on probabilities which can only be judged of by the past, we may reasonably hope that the president of the United States will not be found to combine with a congressional majority for the oppression of the south. But if the veto be exercised in our favor it must serve as a shield, since the obnoxious law must then be rejected unless repassed by two-thirds of both houses of congress, of which the probability is remote.—See Calhoun's and Buchanan's speeches on the veto.

In the estimate of the checks upon an arbitrary

sectional majority, we must not forget that which is in some degree afforded by the senate. Here, indeed, the south is in a minority, but the difference is so small that with an undivided vote of her representatives, there would always be ground of hope that one or more of their opponents would yield to a sense of justice, and unite in protecting her from the tyranny of their opponents. Past events have furnished some striking evidences that this is no Utopian calculation, for numerous occasions have occurred and are now occurring of conscientious and high minded northern members siding with the south on questions of the deepest concern in relation to her interests.

Nor must we omit here to mention the very important check upon the tyranny of the majority, whether upon sectional or general questions, which is afforded by an independent judiciary. That body, though like other men under the influence of political feelings, from which it is impossible in a government like ours that any should be wholly exempt, are nevertheless deserving of the highest confidence, from the manner of their appointment, the elevation of character which is secured by it, the tenure of their offices, and their solemn oaths to support the constitution. Invested with the power of deciding what is and what is not law, they possess by consequence the power of declaring a law to be unconstitutional, and of refusing their aid in carrying it into execution; so that whenever a law can only be enforced through the courts of justice, *their* veto upon it is absolute and final. If therefore a lawless sectional majority should transcend the constitution, they would most probably find an efficient check in the purity, the calmness and the independence of the bench, if their acts were passed under their review. We have recently had a most interesting instance of the capacity of great minds in the pursuit of truth, to elevate themselves above the

influence of their prejudices and their feelings when discharging the responsible duties of the bench. I allude to the recent case of Prigg against the state of Pennsylvania, in the supreme court, in which that court pronounced the law of Pennsylvania, passed for the protection of fugitive slaves, and securing to them the right to a trial by jury unconstitutional and void—Judge Story delivered the opinion of the court, and the rest of the judges concurred in the main question which was decided; thus exhibiting the gratifying evidence of the entire independence of the northern judges, of those fanatical opinions which are so rife among our northern brethren. Story from Massachusetts, McLean from Ohio, and Baldwin from Pennsylvania, all concurred in the judgment which annihilates the obnoxious law.

In what I have said on the subject of sectional majorities, I have principally had a reference to that subject so interesting to ourselves—the subject of our black population. But whilst I am not blind to the existence of the folly and fanaticism of many of the people of the eastern states in regard to abolition, I am well persuaded that the cool and reflecting and intelligent of that thinking people can never seriously meditate a revolution in society here, which would not only spread devastation and bloodshed through the land, but would cripple that agriculture and those valuable resources which are and must always be a main spring of their own prosperity. I have therefore no serious apprehensions on this subject, and there is none other which can be set down I think as altogether sectional. The tariff indeed has been a subject of vehement contention. The struggle on the part of the eastern states to lay discriminating duties with a view to the encouragement of their manufactures has been unremitted; and its success has been the subject of loud complaints among the south. I disclaim any profound knowledge of this interesting subject, and shall therefore only briefly remark

upon the supposed merely *sectional* character of the tariff party. I incline to think we are much mistaken if we attribute its success only to sectional votes. On the contrary very many of the northern and eastern votes are always found in the anti-tariff scale, while southern and western men, from views of national policy are zealously instrumental in building up what they call the American System. Thus it is that Mr. Clay has ever been its distinguished leader; representing an agricultural state in the valley of the Mississippi whose immediate interests are to "buy as cheap and sell as dear" as they can, whether with friends or foreigners. And so with us; there are many wise and patriotic men, who think it better to increase the import for a time on foreign articles for the encouragement of domestic fabrics, by which means a more abundant and cheaper market at home will be created in the end, while at the same time the wealth and strength and the ties of union and the bonds of brotherhood will be incalculably increased. It was a measure first suggested by Hamilton and recommended by Washington, neither of whom could in these opinions have been swayed by the feelings of sectional prejudice. It is not then to be looked upon as a measure forced on us by sectional majorities but as adopted by the general suffrage of a large portion of all divisions of the nation except perhaps *the extreme south*. But though their views may not prevail, there can be no danger of *oppression* in any tariff measure which shall command the votes of Virginians and Kentuckians, or even Philadelphians, or New Yorkers, or of the commercial and maritime cities of the eastern states. The south have the assurance at least that these will not lay grievous burdens on themselves for the sake of oppressing them, and without the aid of many of the members from those states no oppressive tariff ever can be past. On the other hand, if onerous measures are adopted through the influence of our own votes we have no one to complain of so justly as of ourselves.

With these remarks upon the dangers of centralization or consolidation, I shall content myself for the present, and pass on to the dangers of dismemberment and the operative causes which may tend to counteract any centrifugal tendency of the states.

In treating of this matter I shall not here enter into the question of the right of the states or of any one or more of them to dissolve the bond which unites them, and to form other confederations or to assume the character of separate and independent sovereignties. Nor shall I touch upon the question of their power to take the half way, incongruous step of annulling the laws of the Union at pleasure. These are topics which will be the subject of commentary in another part of these lectures. Nor shall I at this time go at large into the subject of the vast importance to the states in general of this admirable union which will be found to be so well treated in the letters of the Federalist. I shall confine myself to a few cursory remarks on the hazard of dismemberment on the one hand and the motives and causes which may tend to counteract it on the other.

Firmly persuaded as I must always be of the value of this union to the states of which it is composed, I must still admit that there may be many who look upon it, with very different feelings, and that occasions may occur in which particular states and even large portions of the confederacy may become restive under its restrictions and impatient of its authority. We are not to believe ourselves totally exempt from the infirmities which belong to our nature, nor to suppose that we shall always exhibit an halcyon calm, while other nations of the world are the victims of rebellion and civil war. We must expect occasional ebullitions of ill humor and dissatisfaction. The south and the north have antagonizing points, and the east and the west may be found to be bound together by less powerful interests than a patriot might desire. The one or the other may regard its

peculiar wants as unattended to, and its prosperity sacrificed to the advantage of a more favored portion. Legislation may occasionally trample as they may think, upon their rights or harshly violate their notions and their feelings. Dissatisfaction may grow up accordingly, and the factious may be willing to see all the elements of the union broken up rather than submit to some petty evil in conflict as they believe with the spirit of the constitution. Such things have been already, in the half century that has elapsed since the adoption of the constitution. The early resistance to an obnoxious law in the back parts of Pennsylvania which was quelled by the vigor of general Washington who called fifteen thousand men into the field for the purpose, may be mentioned as the first and the most open defiance of the authority of the union. In no other instance indeed has there been a resort to arms by the disaffected. But other occasions have occurred on which great dissatisfaction has been expressed, and the sovereignties of the states themselves have remonstrated against the measures of the government, and sometimes in a tone and spirit which seemed to threaten the most serious consequences. During the unpopular administration of the elder Adams, the alien and sedition laws which were passed by a majority of Congress in pursuance of his recommendations, gave rise to a great and general excitement through some of the states. The constitution having declared that congress should make no law abridging the freedom of speech and of the press, and the sedition law having been enacted in direct violation of this express inhibition, the states of Kentucky and Virginia entered into strong resolutions declaratory of the rights of the states and condemnatory of the measures of the government. The resolutions of Virginia and Mr. Madison's report will hereafter be laid before you, and I trust it will be seen that they promulgate nothing which is not truly orthodox. But the legislature

of Kentucky in 1799 when acting on the same subject would have gone a bowshot beyond us if they had really declared (as has been incorrectly alledged*) not only that the federal states have a right to judge of any infraction of the constitution but that "a *nullification* by those sovereignties of all unauthorized acts done under colour of that instrument, is the rightful remedy." Here indeed we might have found the germ of *South Carolina* nullification. But in truth there is no such language in the Kentucky resolutions; though they go to the extent of declaring the laws not only unconstitutional but void and of no force, and that in every case "each state has a right to judge for itself as well of infractions as of the *mode* and *measure* of redress." But Virginia went not so far. Though she exerted with most powerful effect the force of argument and the moral influence of her character in the union to put down the obnoxious laws and to overturn the administration by which they were enacted, she asserted no right to nullify them. Though she declared them unconstitutional, as of right she might do, she refused to declare them "not law, but utterly null, void, and of no force or effect." Those words were stricken out by general consent on the motion of the mover of the resolutions." See Debate, page 203. Thus while she was shaking the foundation of the power of Mr. Adams by enlightening the people and appealing to her sister states, against the invasion of the constitution, she calmly submitted to the enforcement of a statute which is now universally admitted to have grossly violated the express provisions of the charter of our liberties. Calender was tried, convicted, and punished in the metropolis of the state and his imprisonment in the jail of the commonwealth completed the evidence of her submission to the law until it was repealed, and of her disclaim-

* 1 Story's Common Law, 288, in note citing North American Review, 503.

er of the right to *nullify* an unconstitutional act while she continued to be a constituent member of the union. Thus may she ever act! Thus may she ever sustain the great and important truth that an ardent love of liberty is perfectly compatible with a love of order, and a respect for the regular action of constituted authority.

Notwithstanding this forbearance however, it is abundantly manifest that although evils may be borne as long as evils are tolerable, rather than that the foundations of government should be upturned, yet in the event of "an accumulation of usurpations and abuses rendering passive obedience and non resistance a greater evil than resistance and revolution," there may be danger of the states "recurring to" the last resort of all; "an appeal from the cancelled obligations of the constitutional compact to original rights and the law of self preservation, the *ultima ratio* of all governments whether consolidated, confederated or a compound of both."—Madison to Everett.—Our history since the commencement of the century has furnished instances yet more startling of the exercise of the reserved power of the state to question the course of federal administration. In the year 1807, a law laying an embargo for an indefinite term was passed by congress on Mr. Jefferson's recommendation, and it excited as might well have been expected a most angry and embittered feeling among the people of the eastern states, whose commerce was withered by its influence. I have not the command of documents shewing the irritation and disposition to resist, which prevailed during its continuance; but my own recollections are distinct, that though the law was enforced and submitted to under a judgment of the supreme court affirming its constitutionality, yet it was the general sentiment of the day, that its continuance would have endangered the duration of the Union. So too, as to the prevailing feeling among a portion of the eastern people

during the late war; evidenced as it was by the Hartford convention so well known in our political annals. Whether that celebrated body have or have not merited the censures which have been cast upon them, they cannot but be regarded as affording evidences at least of a state of feeling in the east very dangerous to the union. Lastly let me mention the most alarming of all the events which have threatened the permanence of our institutions and the peace and happiness of our land. I allude to the course of South Carolina in relation to the tariff. The constitution having provided that congress should have power to lay and collect taxes, duties, imports and excises, and that body having regulated the tariff of taxes so as to aid the home manufacturer by raising the price of foreign fabrics, the state of South Carolina declared the law unconstitutional and void, and that measures would be taken by that state to prevent its being carried into effect. A proclamation was thereupon issued by the president,* to which the governor of South Carolina responded. Troops moreover, were sent by the United States to the fort in the vicinity of Charleston, and the state militia were called out on the other hand to resist any attempts to enforce the laws. Fortunately, congress being in session, a compromise was made by which the duties were reduced, and quiet, though not complete, harmony was restored. This subject will be taken up hereafter, and it is only mentioned here to exhibit the dangers of dismemberment and civil commotion to which we have been exposed.

The instances which have been given bring forcibly into view the *power* of the organized governments composing the confederacy, at any time at their pleasure to raise the standard of their separate sovereignty and assert their right to secede from the

* See Procl. Enquirer, Dec. 13. Haynes' Procl. Enq. Dec. 28, 1832.

union and set up for themselves. This is one of the momentous consequences of the government being composed in effect of independent states. In governments of centralization the march of usurpation on the other hand cannot readily be stayed for want of organized opposition. At the first appearance of organization, the energies of the government are put forth to suppress and extinguish it. But in a government like ours, composed of six and twenty organized and legitimate powers, each wielding very large portions of sovereignty within its respective bounds, nothing is more easy than to organize opposition, nothing more feasible than to place a separate people in array against the central power—provided only they are unanimous. Hence it is, that while on the one hand, the states stand like sentinels upon the watch-tower—whilst they ever will be vigilant spies and jealous scrutinizers of the acts of federal authority, and whilst their legitimate organization will make them felt in every contest with the general government, they are enabled on the other, if so disposed, to shake the union by their dissention, and to withdraw from its bonds whenever their temerity or ill-judged feeling shall so advise. And should several unite in such fatal councils it is obvious that the result must be disunion or civil war.

What then are the securities and guaranties that have been provided by the constitution, or which grow out of the system itself to preserve us from these lamentable consequences. The framers of the constitution, among other things, provided that not only the senators and representatives and all executive and judicial officers of the United States should take the oath to support the constitution, but also that the *members* of the several legislatures and all executive and judicial officers of the several states should take a similar oath. By this means a very large portion of the leading and intelligent men

throughout the union—of those through whose influence and agency alone there would be any reasonable ground to apprehend disaffection to the union—are bound by the most solemn engagement to support the constitution, and by consequence to preserve the union. Unfortunately, however, the judgment is so often perverted—the eyes are so often blinded; the feelings are so often influenced by our passions and our prejudices, that it is much to be feared no great confidence should be placed in the efficiency of this buttress for the support of our constitution. How many are there who in the bitterness of political feeling salve over their consciences with the plea that the violations of the instrument by the general government is their justification for their alienation. How many are there who are ready to say that rather than see this or that measure, which they deem unconstitutional, persevered in by the government, they would go for a dissolution of the union. Call ye that supporting the constitution? Call ye that backing your friends? Because the bond of union has been violated, or rather has been supposed to be violated in some particular—probably by no means vital—shall we dissolve the whole? Is that to *support* it? shall we sunder *all* its obligations and destroy it *altogether* because others from mistaken views or even ruinous designs have assailed some one or more of its less essential principles? I opine not. So far from its annihilation we should exert ourselves to repair the breach—and that by constitutional means—by elections—by change of rulers, by remonstrances and appeals to our sister states, by the moral influence of truth and the sanative operation of *time* itself. Look at our history! The alien and sedition laws, which after forty years, appear to me as violent *outrages* on the constitution as they did in 1800, hurled one administration from the seat of power, and promptly were repealed. Suppose Virginia, instead of addressing herself to her sister

states, with all the energy of argument and the resistless influence of truth, had caught at the obvious violation of the constitution, and declared herself absolved from the federal bond ! I ask not what would now be our condition. I ask not whether we should have been more happy and more prosperous as a people,—but I ask in direct reference to the oaths, which her legislature had taken, whether she would have better “supported the constitution of the United States,” by dissolving the union, than by the peaceful influence of constitutional measures ? The question presents at once an answer in the negative. I hold, therefore, that it is a sacred duty on the part of every man who has taken this solemn oath, if the constitution be violated in part, to hold on strenuously and faithfully to the rest, and to strain every nerve to restore it to its integrity and purity. *This*, is in my judgment, to support the constitution, and not, because others have violated it, to abandon it forever. As well might those, whose duty it is to uphold this noble edifice, unite to pull down its stately columns and its lofty dome, because a fragment of its cornice had been broken by the rude hand of some ruthless vandal.

Let it not be supposed, however, from what is here said, that I am an advocate for passive obedience and non-resistance to all unconstitutional legislation. I have already declared with sufficient distinctness, I hope, in the language of a truly wise and distinguished politician, that “in the event of an accumulation of usurpations and abuses rendering passive obedience and non-resistance *a greater evil* than resistance and revolution, the members of this confederacy will have a right to recur to the last resort of all ; an appeal from the cancelled obligations of the constitutional compact to original rights and the law of self-preservation ; the *ultima ratio* of all governments, whether consolidated or confederated or a compound of both,” and admitted and re-

cognized not by the disciples of a republic alone, but by the most strenuous supporters also of a monarch's throne.—Paley and Blackstone. See Hamilton's 23th No. in the Federalist. All I contend for is, that we should never permit the petty and occasional deviations from our own notions of constitutional law or abuses of the constitution, which a succeeding administration may remove, to fret us into impatience with our noble institutions, and to prompt a wish to throw away our peace, our prosperity and our happiness, by a dissolution of this glorious union.

To return, however, to our subject. It is not alone in the oath of the legislator or of the judge, of the officers of the states whether military or civil, that we confide for an honest, a faithful and zealous support of the union of the states. It is a sentiment that has sunk deep in the hearts of the people. It has been planted there by our patriots, and above all, by him who was first in the hearts of his countrymen. Permit me to read to you those passages from his farewell address, which bear directly on this interesting topic. Any disputation on the nature and character of our government must indeed be imperfect, which does not avail itself of the parting advice of the father of his country on this important subject.—See 5 Mar. 689 to 695.

Such were the sentiments of General Washington, and though I am aware that from the strong current of party feelings that prevailed at the close of his administration, there were parts of the farewell address that were not acceptable to many, yet his paternal admonitions on the subject of the union, sunk deep in the hearts of all. The sentiments and feelings of the great mass of our population responded to his; and to this day, I am persuaded, that however a doubt of the value of the union may exist in the bosom of the ambitious or disappointed, it has never yet found its way to the great body of the people.

That I am not mistaken in this opinion, is sufficiently manifest by occurrences before our eyes. The sensitiveness which is displayed by leading men and aspiring politicians, the indignation with which they repel every imputation of the spirit of disunion, can leave no doubt of *their* convictions of the state of popular sentiment. They may be fairly looked upon as barometers of popular feeling, for they can ride into power only upon popular favor; and it would be difficult, I doubt not, to find at this time, within the limits of this confederacy, a single leading individual who would avow himself a friend of the dissolution of the union. If there be such an one, he would soon find the policy of locking up his opinions within the recesses of his own heart, lest they should put him in *coventry* with the great body of his countrymen.

If I am not then in an error in this interesting matter, there are consequences from it of a most important character in reference to the remote probability of the secession of any state or number of states from this confederacy. For not only would it follow from the devotion of the people of every state to what has recently been so justly called our wonderful and sublime constitution, (Mr. Calhoun's veto speech,) that there would be little probability of securing a majority in any state in favor of a proposition to secede, but it may be also confidently affirmed, that if such a majority could be commanded, it would be manfully resisted by a numerous and determined minority, devoted to the union, and indignant at what they would freely denounce as treason to the constitution. Looking too with confident reliance to the support of the other states, their spirit would be sustained, and their opposition invigorated to the revolutionary movements of their own countrymen. Hence, let secession come when it may—even though it be the result of “usurpations and abuses no longer tolerable, and of a character

to justify resistance and revolution," yet the unhappy state who may be driven to the step or may rashly adopt it, will most probably find her own bowels torn by civil dissensions within, while pressed by enemies from without. Reason as we may, about the *right* of peaceable secession, peaceable secession is scarcely within the ordinary laws of human action. If oppression and usurpation have given rise to it, what reason have we to suppose that they would be appeased or propitiated by what they would regard as treason in the seceding party to the constitution of the union; and if it has sprung not from *wrong*, but from fretful impatience and restiveness in the seceding state, from a temper captious about trifles, and admitting the justice of no views and no opinions but its own, how can it be expected that five and twenty members of this great confederacy would tamely submit to the destruction of the great and majestic arch by striking out its keystone, or even pulling away its least important fragment. Depend upon it, friends once turned to foes are ever the bitterest enemies; and the instant of secession of one state would, right or wrong, place five and twenty sister states in hostile array against her. The staunch and persecuted adherents of the broken constitution in the seceding state would naturally look to the friends of union every where for comfort and support; and these would be most ready to extend protection to others who, in their view of the matter, would be suffering only for "righteousness sake." Thus it seems to me inevitable, that come when they will, disunion and secession must result in civil wars, and end at last, perhaps, in ruthless despotism; for *that*, all experience shows, is the waveless calm into which the troubled ocean of civil discord usually sinks with deceitful and fatal repose.

Blessed be God, we have yet escaped these horrible catastrophes. Yet we have seen enough to

know, that unanimity of sentiment is not to be expected among the people of a state which places itself in opposition to the union. Look only to what has happened of a less serious character. In every instance in which a member of the union has even remonstrated or protested, she has done so with a divided population. Great as was the provocation in 1798-99, and dignified as was the appeal to their sister states against the alien and sedition laws by Kentucky and Virginia, their resolutions were sanctioned by no triumphant majorities; in Virginia 100 to 63. Had Virginia at that day fallen back upon her reserved rights, and renounced any further submission to the violated constitution, one-half of her people would have been in rebellion against her authority, with Patrick Henry,* and John Marshall, and George Keith Taylor, and James Breckenridge at their head. Had the western insurrection in Pennsylvania infected one-half the state, the other would have taken arms to suppress it. Had the unhappy disturbances with South Carolina proceeded, some of her noblest sons and a large portion of her population would have adhered to the union; and when the Hartford convention seemed to threaten treason and rebellion, it but gave vigor and indomitable spirit to the staunch patriots and faithful adherents of the federal constitution, who swarmed throughout that disaffected land. Let it then enter into the sober calculations of every state withdrawing from the union, that in doing so, she hazards civil discord within her borders, and desolating wars with former friends.

Let me next advert to another consideration which strongly fortifies our hopes of long continued union. No one can look with any fear of disaffection to any portion of our unambitious yeomanry unless misled by disappointed and ambitious demagogues. How

* Mr. Henry died in that year.

is it with them ? How is it with the great and aspiring men who lead the people and whose eyes are fixed with steadfast gaze upon the presidential chair ? Can we believe them blind to the imposing difference between the presidency of this great republic and the chief magistracy even of its most important member ? Can we believe they would willingly pull down the elevated seat for which they have so often panted ? Believe it not. Disappointment and vexation may sometimes curdle the veins of a defeated statesman, and in the moment of his excitement he may talk big of dissolution ; but let the heavens clear away and his prospects brighten and he will be found once more the most zealous champion of " the beautiful and profound system of our federal constitution." (Mr. C's speech.) And so is it also of all the other posts and places under the general government. As a " saint in crape is twice a saint in lawn" a member of congress, or a judge of the supreme court, or any other of the high dignitaries of federal authority are looked upon, as to political elevation, as far above the corresponding stations in the more limited theatre of state authority. The ambitious will ever be loth to pull down the government that offers the most attractive lures to their eager pursuit of greatness. Indeed but for the powerful checks already adverted to, the real danger would be of the influence of federal patronage in winning over the corrupt to the extension of the powers of the general government beyond the legitimate bounds prescribed by the constitution.

In conclusion of these crude views of the federative principles of the government and of the powerful motives which should bind the states to the zealous support of the union, I cannot do better than to recall the recollection of the class to the very able papers which they have so recently perused from the pens of Mr. Hamilton, Mr. Madison and Mr. Jay. Those papers have been, with great propriety, made a manual for our youth, and I have only to express

a hope that their wise and wholesome councils have made a due impression upon your hearts, and that that impression may be as indelible as it is salutary.

I will conclude this lecture by reading to you De Tocqueville, pp. 369 to 401.

LECTURE XII.

In the attempt to lay before you the true principles of government, young gentlemen, you will recollect it has been my effort to shew you that the happiness of the people which is the only legitimate object of all political institutions is only to be found in a mixed government; that public virtue the main ingredient to be sought for, is to be expected only in those in which the democratical principle is largely infused, and that our own affords, perhaps, a fairer prospect than any other of permanence and stability, and of accomplishing the great purposes for which it has been established. It has been admitted, however, that the democratical principle has certain imperfections and unfavorable tendencies which should be vigilantly watched and carefully counteracted. Some of these have already been alluded to and some suggestions have been offered as to the salutary checks which our system affords to its irregular and extravagant action. There yet remain, however, some matters touching the weak points in our institutions which ought not to be entirely pretermitted.

The origin and root of all evil in governments partaking strongly of the democratic character, is

the want of knowledge and of good principles in the mass of the people. When they are rude and uninformed, reckless of the rights of persons and of property, prone to disorder and violence and contempters of law and regular government, their influence in public affairs must be mischievous instead of salutary, and men will soon learn to sigh for the calm of despotism as a refuge from the hourly perils of a licentious and ungovernable populace. If the people are to govern through the medium of representatives, if their will is to be the law, either mediately through the effect of their influence or directly by the exercise of the right of instruction, it is obvious that they should be thoroughly imbued with good principles, and as far as possible, with some knowledge of the general character of their institutions, and the great interest and concerns of the country. Education, therefore, is of primary importance;—in its broadest sense, if you please, as far as that is practicable, consistently with the undeniable and irreversible destiny of our race; “In the sweat of thy face shalt thou eat bread until thou return unto the ground.” The wants and necessities of man must forever require that a large portion of the species should be devoted to the workshop or the field, to the loom or to the plough. All cannot be Solons, or Solomons, or Newtons, or Laplaces. All cannot be mathematicians and philosophers, men of literature or jurists. But all may acquire what the necessities of their condition demand! It does not follow that they are unfit to select from the cultivated portion of their countrymen, those who are fit to be entrusted with their concerns, because they cannot calculate an eclipse or master the differential calculus. It does not follow that they are unfit to *choose*, because they may be unfit to be chosen. If we admit with Jesus the son of Sirach, “that the wisdom of a wise man cometh by opportunity of leisure,” and ask with him, “how he can get wisdom who

holdeth the plough, who glorieth in his oxen and whose talk is of bullocks ;” if we agree that such should not be sought for in public counsel, nor set high in the congregation, are we therefore to admit that they are to be degraded from the rank of free-men, and made the slaves of a tyrant’s will? God forbid ! They may all be taught what is necessary for their station—what is essential to enable them well to play their part in that state of life to which it has pleased God to call them.

What are their first lessons and when to be instilled? These first lessons are obedience and submission to lawful authority; the love of country, and of virtue and its holy principles ;—principles adapted to the capacity of every living soul ; respect for the rights of others, whether of person or of property ; command of their passions, and the habit of appealing to reason and the law as their director and their guide. These are the rudiments of that education with which every man (even the poorest and most ignorant) may be imbued. It begins with the cradle, and its precepts must be first taught by a mother’s lips, and enforced by a father’s influence and authority. As youth progresses, he may learn to know and estimate his *rights* and what is not less important, to know and estimate his *duties*. He must learn to respect order, to venerate the law as his only sovereign, to regard as traitors to its authority those who take the power into their own hands, and to be ever ready to vindicate and protect it from assault. He must learn in the exercise of political rights to act with a single eye to his country’s good, and to eschew the baneful influence of party as ruinous to free institutions. He must learn too some forbearance and moderation—some modesty in the avowal of his opinions ; some backwardness in undertaking, in matters of which he knows nothing, to *instruct* those who are better informed, and in whom he has already reposed his confidence. With

such lessons instilled into the mind of youth, the most ameliorating influence would soon be felt in public affairs. And if to these lessons, which are fitted to every capacity, are added the advantages of liberal education, and of elevated principles for that portion of the people, whose situation or whose means will afford them the acquisition of wisdom from "opportunity of leisure," we might look to our free institutions as possessing the fairest claims to happiness and stability. In such a state of society, we should cease to tremble at the shaking of every leaf, from the fear of mobs, and rioters: we should soon rest in quiet when there would be none to make us afraid. Nay, more—not only would peace and order prevail throughout society, but we should soon see the political bodies moving in their respective orbits, harmoniously and with dignity. We should cease to feel anxieties for the safety of our union, and to apprehend its dissolution from the hoarse jarring of contentious factions on the floor of congress, or from their rash and reckless action under momentary impulses. We should have no reason to anticipate a dangerous secession of a large body of the representatives, such as well nigh occurred but a few years ago: "A practice subversive of all the principles of order and regular government, a practice which leads more directly to public convulsions and the ruin of popular institutions, than any other which has yet been displayed among us."

There are indeed other sources of anxiety which may well disturb the patriot breast in relation to the affairs of the union. The general government is not only liable, like every other, to disturbance in its own concerns, but its relative situation towards the states may seriously involve it in any domestic violence which may exist among them. It is provided in the constitution that the United States shall guarantee to every state in the union a republican form

of government, and shall protect each of them against invasion; and on application of the legislature (or of the executive, when the legislature cannot be convened) against domestic violence." While human nature remains the subject of the same passions, and frailties, and vices which have marked its career from the days of Adam, we must expect occasional disturbances in relation to the internal concerns, and the struggle for power in six and twenty separate and independent states. To say nothing of the delicate question as to what is to be considered as falling within the meaning of a "republican form of government," let us ask ourselves what is to be done, if a portion of the people of a state, considering themselves oppressed, and denied their just and equal rights should demand a change of the constitution of the state which should be resisted by the authorities, and that they should call upon the general government to suppress a "domestic violence," in which nine-tenths of the people may be involved? I do not ask what the government is to do, but what may be the consequences of its action? The case seems to be about to present itself at the present moment. The state of Rhode Island is in a state of commotion, which, without great prudence on the part of the people, and her rulers may lead to civil broil and insurrection. Her constitution is the musty charter of Charles II., and by its provisions, a large portion of her people are disfranchised. They have asserted their rights—insisted on a new constitution, while those who have the power, grasp it with a tenacity very natural to man, though very reprehensible. The militia have been called out, but it has been like calling spirits from the vasty deep. They will not come when they are called. Suppose the large majority of the people persist in their efforts, and the constituted authorities call upon the general government to protect them from domestic violence? What would be the consequence

of interference? Take a larger state. In 1816, the western people of Virginia, restless under the gross inequality of representation in the legislature which gave them but four out of twenty-four members in the state senate, and a very inadequate number in the house of delegates, called a convention which assembled at Staunton, for the purposes of taking measures to correct the evil. Some were of opinion that that body should at once call a convention to form a new constitution. It was my lot to be among them, and then as now, I was of opinion, that moderate and temperate measures should always be pursued for correcting evils in the existing state of things less fearful than civil war. That must have been the result when two authorities would be up, neither supreme, and both contending for the upperhand. These peaceful counsels prevailed, and a respectful memorial was adopted, earnestly requesting of the legislature to call a convention, which, after some years, was done, and a new constitution was adopted. Suppose a different course had prevailed, and the governor of Virginia had called for troops to put down the new constitution, formed by the western people? What would have been the awful consequences of such a step? Who knows, save heaven? Even recently, new difficulties seem to be arising between the western and the eastern people, and the protest of the former, through their delegates, against the rejection of their pretensions is already before the public. Can we not all perceive the delicacy of the measure on the part of the federal government, of raising troops for the purpose of upholding one party against another in the state. General Washington, indeed, called out 15,000 men to suppress an insurrection against the government, but who since his day, could have exercised such a power without shaking the union to its centre. However certain it may be, (as in the case of South Carolina,) that there were many opposed to

the measures of the state, yet it is not easy to calculate the reflux of feeling, when the inhabitant of the state should see a powerful army marching through his native land, and reducing its proud and gallant people to submission. Still more difficult would it be, to foresee the effect upon adjoining states. A general war might be the fatal consequence, and a general war among the states would shake to pieces this noble fabric, which is so admirably adapted to provide for our prosperity and promote our happiness.

With all my confidence then, in the permanence of our institutions, I frankly confess, that it is not a confidence in their being able to stand the shock of civil war,* but only in *their* tendency, and the tendency of our situation and our people to avoid it. If, forgetting the dictates of justice, moderation, and the great interests of the nation, the people of these states should once excite the tempest of war between themselves, the constitution under which we live would go to pieces in the storm. It would be submerged inevitably amid the waves of civil discord, and an universal despotism or jarring confederacies would take its place, and spread themselves over our desolated land. Against such events it is impossible to say that we shall always be protected. The prudence and good sense of the nation is our best security. No form of government can always avoid or control what the bad passions of our nature may give rise to. For "as to those mortal feuds which in certain conjunctures, spread a conflagration through a whole nation, proceeding either from *weighty* causes of discontent given by the government or from the contagion of some violent popular paroxysm, they do not fall within any ordinary rules of calculation. When

* The whole of the remarks in the Federalist (No. 16, pp. 85, 86, 87,) as to the danger of civil commotion under the old confederation, have strong application to the present union, if once the tocsin should be sounded.

they happen, they commonly amount to revolutions or dismemberments of empire. It is in vain to speculate or to attempt to guard against events too mighty for human foresight or precaution, and it would be idle to object to a government, because it cannot perform impossibilities."

There is yet another subject of momentous consequence which I deem it proper to touch upon, though in doing so, I may seem perhaps to wander from my proper sphere. It is the subject of the public credit, and the duty of providing liberally for the public defence, the public prosperity, and the general welfare.

In the government of the people, the purse-strings of the nation are held by itself. Supplies for armies and navies, for fortifications and munitions of war, can only be raised by its consent. Now we have seen that the first of all duties to our country is its defence against a foreign enemy. Our first obligation, then, upon all occasions, is to advance, without a murmur, what its necessities may require, and to foster the means of commanding its ample resources in the day of difficulty and need. Unfortunately, however, there is a general propensity, manifested in those who have the power over the purse in a popular government, to resist the imposition of taxes, except in cases of dire extremity, to decline the creation even of necessary burdens, and to hazard the safety of the state from a false apprehension of the oppression of the people. Economy, indeed, in the public expenditure, cannot be too much commended, but a liberal supply of what is demanded by the necessities of the nation, is not less worthy of all approbation. The wanton waste of the public monies, or their unwise appropriation to injudicious and visionary schemes, will always merit the reproaches of the nation; but the generous patriotism which will pour out its treasures as freely as its blood, in defence of all that is dear to the

heart of man, cannot fail to extort the approbation of the people, as it never fails to command the admiration of the world. It is then the unquestionable duty of the representative to vote supplies, instead of niggardly withholding them from the absolute wants of the government; and it is just as imperious a duty to impose a tax when demanded by the exigencies of the state, as to be vigilant in protecting society from unnecessary burdens.

To be enabled, however, to effect the great object of commanding and providing the resources necessary for war and for other extraordinary emergencies of the state, there are certain principles to which we should, as far as possible, most steadfastly adhere. In the first place, it should be our maxim and our practice, to accumulate no debts *in time of peace*. There is no sentiment which can better deserve the attention of the legislators of any country, than that expressed by Gen. Washington, in his message to congress in 1795, which indicates the danger to every government from the progressive accumulation of debt. A tendency to it, is perhaps, the natural disease of all governments; and nothing is more calculated to lead to great and convulsive revolutions. Money has, from all time, been the fruitful source of discord, and the debtor and creditor, when the prize is great, are always placed in a position of natural hostility.

This tendency to accumulation of debt, arises from the ordinary course of human events. "On the one hand, the exigencies of a nation, creating new causes of expenditure as well from its own, as from the ambition, rapacity, injustice, intemperance and folly of other nations, proceed in increasing and rapid succession. On the other hand, there is a general propensity in those who administer the affairs of a government, founded in the constitution of man, to shift off from the present to a future day, the pressure and the burden—a propensity which

may be expected to be strong, in proportion as the form of the state is popular." For the natural propensity to get what we can, and to hold fast to what we get, is often far too strong for the commands of duty or the dictates of patriotism; and the people holding the purse-strings, are backward in taxing themselves;—in giving to the necessities of the state by taking the smallest scruple from their own comforts or their own luxuries and enjoyments. Hence, although to extinguish a debt which exists, and to avoid contracting more, are ideas always favored by public feeling and opinion, yet to pay taxes for the one or the other purpose, (which after all, is the only means of avoiding the evil,) is generally more or less unpopular. These contradictions, indeed, are in human nature, and happy would be the lot of any country where there are none disposed to turn them to sinister account. It is, however, no uncommon spectacle, to see the same men clamoring for occasions of expense, which chance for the moment to be popular, yet vehement against every plan of taxation, which is proposed for the discharge of subsisting debts or for avoiding new ones, by raising necessary revenue, to defray the necessary expenses of the government as they arise. "Hence, the evil day is put off; *borrowing*, instead of *taxing* is resorted to, even in profound peace, and a debt is created in its halcyon days, which sits like an incubus upon the nation, when the hour of her trouble cometh. Millions are suffered to accumulate upon the state, rather than an additional farthing should be extracted from the pockets of the people. Members of the representative body without other merit, seek to ingratiate themselves with the narrow-minded among the people, by drawing tight the purse-strings, and voting against every scheme for levying money by taxation. These unhandsome acts throw artificial embarrassments in the way of the administrators of the government;

and even they are themselves too apt to feel also a disposition to *conciliate* public favor by declining to lay even necessary burdens, or to *avoid the loss of it* by imposing them with firmness; and thus they serve to promote the accumulation of debt by leaving that which exists without adequate provision for its reimbursement, and by preventing the levying, with energy, of new taxes when new occasions of expense occur. The consequence is, that the public debt swells, till its magnitude is enormous, and the burdens of the people gradually increase till their weight becomes intolerable. Of such a state of things, great disorders in the whole political economy, together with convulsions and revolution are the natural offspring, and there can accordingly be no more sacred obligation on the public agents of a nation, than to guard against such a mischief with steadfast and inflexible constancy. Public *debts* in time of peace should then be scrupulously avoided. *Borrowing* in time of peace should be always discountenanced; for borrowing is with us the chief resource in war; and that resource should not be sap-
 ped for the expenses of a peace establishment, which taxes would defray, almost without being felt. In *peace* at least, the evil of the day should be borne by itself. Pay as you go should be our maxim. Justice, fair dealing, love of country and true policy forbid our transmitting our own burdens, and a debt arising from our sordid selfishness to the shoulders of our posterity.

The propriety of these principles will be more apparent when we reflect upon the difficulties and necessities to which particular exigencies of the state may give rise. What are to be our resources in the event of foreign war? War, whether of offence or defence, cannot be successfully waged without means. Tens of thousands engaged in the wasteful business of arms, dissipate the treasures of the state with most fearful rapidity. Hundreds of thousands taken from

the business of production, from the workshop and the plough, from the loom and from the harvest, and devoted to the work of destroying and cutting throats, soon eat out the hoarded riches, and the hard-earned contributions of the suffering people. To what resources then can the nation look? To her customs? Take our own country. War cuts off our commerce, and *annihilates* our customs. During the last war the revenue from that source was reduced to little more than four millions, though in the year after it ended they mounted up to thirty six. Shall we resort to excises and direct taxes ;—to the most expensive, unproductive and vexatious impositions known to our system ? to a source to which we would not resort sufficiently in time of peace to keep down our debt? We *may* do so—we *must* do so, but yet it will not suffice. In war we *must borrow* also. “ Loans in foreign wars are found an indispensable resource even to the wealthiest nations ! In a country like ours possessed of but little monied capital, the necessity for that resource must be in such emergencies proportionably urgent ; and as on the one hand the necessity for borrowing is undeniable, so on the other it is equally evident that to borrow upon good terms whether at home or abroad, it is essential that the credit of the nation should be firm and well-established. Now one of the first and most essential means of enabling us to borrow in time of war, is to have no debts in time of peace. With nations, as with individuals, *cæteris paribus*, those which are out of debt, can borrow upon the easiest terms. England indeed, with her immense debt, can nevertheless borrow advantageously ; but she owes her power to do so, to her inviolable good faith in performing her engagements, and to the immense and redundant capital of her people, which is always seeking investment. To us it is of no little moment to add to our command of money in the market, by going into war unincumbered by a debt.

But other principles must also be adopted for sustaining public credit and enabling the nation to borrow upon good terms. We must establish its credit by the observance of the most scrupulous good faith. For when the credit of a country is in any degree questionable, it is always obliged to give an extravagant premium, in one shape or another upon all the sums it has occasion to borrow. Nor is the evil confined to borrowing. The same disadvantage must be also sustained upon whatever *is bought* on credit. From this constant necessity of borrowing and buying dear, it is easy to conceive how immensely the expenses of a nation in a course of time will be augmented by an unsound state of public credit. During the late war, United States loans fell to 62, making a dollar paid for sixty two cents received. To attempt to enumerate the complicated variety of mischiefs in the whole system of the social economy, which proceed from a neglect of the maxims which uphold public credit, would lead me too far were I even capable of the task. It is however rendered indubitable by experience, that on their due observance depends the individual and aggregate prosperity of the nation ; their relief from difficulty in great emergencies, their character as a people and the cause of good government.

“ If the maintenance of public credit then be truly so important, the next enquiry which suggests itself is ; by what means it is to be effected. The ready answer is “ by not abusing it ;—by good faith—by punctual performance of contracts.” States are like individuals ; if over head and ears in debt, few will like to trust them ; and on the other hand, those who owe nothing can borrow what they want. Moreover, those who will observe their engagements faithfully are respected and trusted ; while the reverse is the fate of those who palter with their faith. To *delay*, and still more to *refuse* payment when due, to *seek ingenious pretexts* and subtle devices for evad-

ing public engagements, and to exert the *powers of sovereignty* in *wronging our creditors*, will ruin our credit and destroy our capacity for borrowing forever ; while at the same time it sinks us in the eyes of our own people and degrades us in the estimation of the world. Look to Great Britain. With her thousand millions of debt, she can borrow *ad libitum*, because she pays at the stipulated hour. By her punctuality her debt becomes a sort of property or estate in the hands of individuals, which they buy and hold and enjoy as they would hold a real estate. They have no more doubt of it than of the title to their lands. It thus holds out a convenient subject for investment for all who have capital otherwise unemployed—for all who have retired from the perplexities of business, and desire to pass the evening of their days at ease, and for widows and others whose situation forbids their engaging their scanty means in active commerce. It is like bank stock, which every man may buy with confidence, when he has any thing (however small) to invest. By this ingenious means, sustained by faith inviolate, all the loose and unemployed capital of the kingdom is thrown at its pleasure into the hands of the government ; and thus it is rendered capable, in moments of imminent national danger, of those gigantic efforts by which in the last fifty years it has astonished the world !

Look now to our own history :—I mention it not as a reproach to ourselves (for our situation during the revolution was peculiar) but as a warning and a salutary lesson. From various causes unnecessary to be enumerated, the United States, and the individual states, in the prosecution of the war of Independence, were compelled to contract immense debts, by borrowing or by purchases on terms of future payment. These debts they were unable to discharge, and the consequence was that they fell in the market to about two and sixpence (I think) in the pound. In that state of things and in the uncertain condition of

our political concerns, farther borrowing was impracticable. But when the *Union was established*, when the debts created in the struggle for liberty had been assumed, and when provision was made for their payment, those very debts shot up above par. Credit at once was re-established. Money could be had by the government on terms as reasonable as by individuals. It came out of its hiding places—for it is always hoarded when it cannot safely be invested. But the system for supporting public credit gave confidence to the holders, and above all the union, a firm and well adjusted government, giving assurance, of permanence, of order, of public faith, of safety and of ability to comply with its engagements, spread confidence throughout the land and opened the purses of the timid, and even the strong box of the miser.

Simul alba nautis stella refulsit,
 Defluit saxis agitatus humor;
 Concidunt venti, fugiuntque nubes,
 Et minax (quod sic voluere) ponto
 Unda recumbit.

It is not wonderful indeed that money lenders fear to trust a faithless state. They know full well there are no courts and juries made for them,—no casa's for their bodies, or elegits for their lands. If they lend to *individuals*, the strong hand of the law will extort fulfilment of their engagements, but the sovereign power must be trusted on its faith alone. It may even pledge its funds, but if it have not faith it will not heed the pledge, and thus the pledge itself is nought.

“From these considerations, it is clear, that every breach of the public engagements whether from choice or necessity is (though in different degrees) most hurtful to public credit. When such a necessity does truly exist, the evils of it are only to be palliated by a scrupulous attention (on the part of the government) to carry the violation no farther than the necessity absolutely requires; and to manifest (if the

nature of the case admits of it) a sincere disposition to make reparation whenever circumstances shall permit. Moreover to leave no room for doubt in the mind of the capitalist, to make to him "assurance doubly sure," it has long ago been suggested and has usually been wisely practised in our administration, that we should regard it as a fundamental maxim in the system of public credit in the United States, that the *creation of the debt should always be accompanied with the means of its extinguishment*, and the pledge thus given, should be inviolate. "This is the true secret," said Mr. Secretary Hamilton, "for rendering *public credit immortal*, and, *it is* the secret which has rendered that of Britain, so. It clothes the debt with the character of private property, and by making the pledge of funds, *a part of the contract* with the lenders," removes all reasonable apprehension of loss by them. "Happily, (as Mr. Hamilton observes,) the United States have a large field of resource yet unexplored. Their youth, *their large tracts of unsettled lands*, says he, (and land in the infancy of improvement,) assure them a great and rapid increase of means." These lands and their proceeds, present at once an ample fund for the security, in times of difficulty, of the principal and interest of money borrowed for national defence. So too with our revenues from commerce. They are large and growing, and though interrupted in time of war, yet, by the restoration of peace, their increasing productiveness is resumed with renovated vigor. Such as has been already observed, was the effect of the late war. Depressed during its continuance, to four millions of dollars, the customs rose at once on the return of peace to thirty-six; and though that was much above the average amount, yet ever since, the produce of them has usually exceeded twenty millions.

I conclude these crude suggestions on this most

important topic, with the remark that they apply with not less force to the states themselves than to the United States. For though as members of the confederacy, their limited concerns can never require them to incur a debt in time of peace, yet, in time of war, when every nerve is strained, and every limb of the body politic is brought into action, their credit, their efforts may be demanded to save the sinking state. Nay, more, as the natural resources from customs must always be impaired, and a direct tax resorted to in time of war, a state with well established credit, may be enabled to assume its quota of the tax, and relieve its people from pressure, (when they are least able to bear it) by a loan to its amount. Credit thus may be as necessary to the states as to the general government, and it should therefore be cherished with the most watchful care. It is a tender plant, and by the slightest frost is withered and cut down.

I have now concluded, young gentlemen, in my poor way, the few remarks on the subject of the nature and objects of government, and of the character of its several forms which I have deemed worthy of your consideration, and which my limited leisure has enabled me to throw together. After enquiring into the original formation of society and government, into the effect of its structure upon the natural rights of man, we have proceeded to consider the nature of sovereignty, and the formation or organization of governments, whether founded on force, acquiescence under superior power, or express consent. We next pointed out the great objects of government, and went into a cursory examination of the three simple forms, with a view of ascertaining, in which we were most likely to find the principles calculated to promote and sustain those indispensable objects. Disappointed in our hopes of discovering any *one* which would answer

the great purposes of political institutions, we next turned our thoughts to mixed governments with the expectation of combining the tendencies of the simple forms so as to secure the advantages of each. To enable us to arrive at just conclusions on this interesting topic, we passed in review the British constitution, and dwelt with no little satisfaction on the democratical principles which seem to be infused into it. But finding the powers of the crown and the nobility yet too great for the happiness of the people, we advanced to the examination of representative democracy and our own institutions. Allowing to this form of government all its alleged advantages, and giving to it as we do, a most decided preference, we have not thought it wise to "wink so hard" as not to see its defects, or to be utterly insensible to its weak points or to the hazards which are inseparable from its very nature. We have stated and examined these, I trust, with fairness and candor, and have then proceeded to present the strong checks and counteracting principles in our system and in our situation. In pursuing these enquiries, we were unavoidably led to turn our eyes to our federal institutions. Finding in them the happiest effects in remedying and supplying the deficiencies, which, but for them we should have much reason to apprehend, we have been naturally led to an examination in its turn, of the tendencies and imperfections, of the federal government, and to some deeply interesting speculations as to its probable permanence and stability. This has brought before us the dangers of centralization and dissolution, from both of which we fondly hope, we shall long be free. And we have brought ourselves to indulge the consoling belief that though the shock of domestic war would probably shake the fabric to its centre, yet that the interests and the sagacity, and the patriotism of our people will long protect us from the fatal calamity. One of the most ef-

ficient modes of preventing it I deem to be that which
 it has been my object to pursue : to imbue the minds
 of those who are at some future day to be the legis-
 lators of the land, and the leaders of the democracy,
 with a just sense of the dangers to which our insti-
 tutions are exposed, and the weighty duties which will
 devolve upon them for their prevention.





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